Supreme Court, U.S.
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No. 87-

In the Supreme Court of the United States

OCTOBER TERM, 1987

KALIMA JENKINS, *et al.*,
Petitioners,

-v-

THE STATE OF MISSOURI, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

Whether the courts below erred in denying petitioners a contingency enhancement despite finding "that the Kansas City market generally compensates for assuming the risk of contingency cases" and uncontroverted proof that in major school desegregation cases plaintiffs encounter great difficulty obtaining counsel on a contingent fee basis even with the prospect of a court-awarded contingency enhancement.

PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

The parties to the proceeding in the Court of Appeals were as follows:

Appellees/cross-appellants (now petitioners):

Kalima Jenkins, by her next friend, Kamau Agyei

Carolyn Dawson, by her next friend, Richard Dawson

Tufanza A. Byrd, by her next friend, Teresa Byrd

Derek A. Dydell, by his next friend, Maurice Dydell

Terrance Cason, by his next friend, Antoria Cason

Jonathan Wiggins, by his next friend, Rosemary Jacobs Love

Kirk Allan Ward, by his next friend, Mary Ward

Robert M. Hall, by his next friend, Denise Hall

Dwayne A. Turrentine, by his next friend, Sheila Turrentine

Gregory A. Pugh, by his next friend, Barbara Pugh

Cynthia Waters, by her next friend, David Winters, on behalf of themselves and the class of black and

white present and future students in the Kansas City, Missouri School District.

Appellant/cross-appellees (now respondents) the Kansas City, Missouri School District and Dr. George Garcia, Superintendent.

Appellants/cross-appellees (now respondents):

The State of Missouri

Honorable John Ashcroft, Governor of the State of Missouri

Robert Bartman, Commissioner of Education of the State of Missouri

Wendell Bailey, Treasurer of the State of Missouri

The Missouri State Board of Education:

Roseann Bentley, President
Dan Blackwell
Terry A. Bond
Roger L. Tolliver
Raymond McCallister, Jr.
Susan D. Finke
Thomas R. Davis
Cynthia B. Thompson

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

KALIMA JENKINS, et al.,

Petitioners,

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THE STATE OF MISSOURI, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners, KALIMA JENKINS, the named representative of a certified class, et al., respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit affirming the denial of a contingency enhancement of the attorney's

fees awarded petitioners for the work of their lead counsel, Arthur Benson.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, reported at 838 F.2d 260, is set out in the Appendix, 2a. The unpublished May 11, 1987 order of the United States District Court for the Western District of Missouri is at 43a. The unpublished July 14, 1987 order of the District Court amending its May 11, 1987 order is at 91a.

JURISDICTION

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). The Court of Appeals entered judgment on January 29, 1988, and denied the State of

Missouri respondents' request for rehearing on April 13, 1988.

STATUTORY PROVISIONS INVOLVED

This case involves The Civil Rights Attorneys Fees Awards Act of 1976, 42 U.S.C. § 1988 (1982), which provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985 and 1986 of this title . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

I. Preliminary Statement

This petition arises from the attorneys' fees phase of the Kansas City, Missouri school desegregation case. The action arose under the Constitution and

laws of the United States and 28 U.S.C. § 1343 and jurisdiction of the United States District Court was based on 28 U.S.C. § 1331. The school children petitioners, as prevailing parties in the school desegregation case concluded against the State of Missouri and the School District of Kansas City, Missouri (KCMSD), sought a reasonable attorney's fee for their counsel's work in vindicating their constitutional rights, principally pursuant to 42 U.S.C. § 1988.

A. The "Merits" Litigation

Following extensive discovery that involved over 180 depositions and a trial that required 93 days, petitioners obtained a judgment against the State of Missouri and the KCMSD imposing joint liability for the segregated schools of

Kansas City on September 17, 1984. Jenkins v. State of Missouri, 593 F.Supp. 1485 (W.D.Mo. 1984). After two more weeks of trial, petitioners obtained an order against the State and the KCMSD on June 14, 1985, requiring $37 million in capital improvements and $50.7 million in new operating programs to remedy the constitutional violations found by the district court. Jenkins v. State of Missouri, 639 F. Supp. 19 (W.D. Mo. 1985).

On appeal, the United States Court of Appeals for the Eighth Circuit affirmed the district court's dismissal of the suburban school districts and certain federal defendants and affirmed the Milliken II (Milliken v. Bradley, 433 U.S. 267 (1977)) remedies imposed on the State and the KCMSD (with some modifications). Jenkins v. State of

Missouri, 807 F.2d 657 (8th Cir. 1986)(en banc), cert. denied, ____ U.S. ____, 108 S.Ct. 70, 98 L.Ed.2d 34 (1987).

B. The "Fees" Litigation

Arthur Benson, petitioners' lead counsel, commenced his representation of petitioners in February 1979. During the course of the litigation Benson's representation encompassed not only his personal efforts, but also those of two associates, seven paralegals, and his secretarial and clerical staff. Because the resources of his law office were limited to those just described, Benson eventually obtained the assistance of the NAACP Legal Defense and Education Fund, Inc. (LDF). Several LDF attorneys assisted Benson on the litigation and the LDF shared the burden of the litigation

expenses. (Since this Petition for Writ of Certiorari is limited to the denial of a contingency enhancement on petitioners' claim for Benson's services, the factual discussion will be limited to the legal services Benson provided petitioners.)

Petitioners' attorney's fees request covered seven years' work through June 30, 1986, and included work on the liability and the initial remedy stages of the case and first year monitoring. In recognition that petitioners were unsuccessful in certain claims against the suburban districts and the federal defendants, and that Hensley v. Eckerhart, 461 U.S.424 (1983), would require some reduction in fees, petitioners volunteered a reduction of 4,490 of Benson's hours. 96a - 97a. (This voluntary reduction, based on the hourly rates actually awarded by the

district court, was $318,761, approximately 21% of the lodestar petitioners requested for Benson.) The requested lodestar, after the Hensley reductions, was based on 9677 attorney hours and 5586 paralegal hours.

Petitioners sought a risk or contingency enhancement on behalf of Benson, requesting an enhanced hourly rate of $375 for Benson for work done through September 17, 1984, the date of the district court's ruling on liability (and a $240 hourly rate for his associates' work). The requested enhancement was reduced to $250 per hour for Benson (and $160 per hour for his associates) for the remedy work done through June 30, 1985, the date of the principal decision on remedies. See generally, "Suggested Approach to Awarding Fees," filed Jan. 16, 1987, Tab XII, at

pages 4-5. No risk enhancement was sought for monitoring or for the fees litigation.

The district court held a one-day evidentiary hearing on February 27, 1987.

1. Extraordinary Preclusion and Delay in Payment Problems Were Presented by the Case.

Benson's contract with the petitioners provided for payment only through court-awarded attorney's fees should the litigation prove successful. Benson Aff., Feb. 5, 1986, Tab D at 2. Neither petitioners nor the LDF paid Benson any fees for his work on this case. The district court made the following findings in its May 11, 1987 Order (51a - 52a):

> [F]rom early 1983 until the end of 1985 Benson devoted nearly all of his professional time to this case and was thereby precluded from accepting other employment. Similarly, Benson's staff was also precluded from other employment for a period of at least one year while working full time on this litigation.

From 1983 through 1986 Benson borrowed in excess of $633,000 in order to maintain his law firm as a viable organization through the course of the litigation. Benson Aff., Jan. 16, 1987, Tab III; T. at 131-132; see also June 30, 1987 D.Ct. Order, at page 1. This debt was incurred by Benson to obtain the funds necessary pay his own and staff salaries, his office overhead, and $73,000 in direct litigation expenses. Through December 31, 1986, Benson had paid $113,706 in interest on this indebtedness, and he continued to pay approximately $5000 per month in interest. Benson Aff., Jan.16,1987, Tab III. In addition to the $633,000 owed financial institutions, Benson owed his associates and staff some $97,000 in deferred compensation for overtime worked on the case. T. at 125, 131.

The economic loss due to delay in payment was quantified by the uncontroverted testimony of Robert Weil, a prominent expert on law office economics, and John Ward, a University of Missouri professor of economics. Both testified that payment at current hourly rates would not adequately compensate for the delay in payment, with Weil explaining that "hourly rates have not gone nearly as high as the compounding effect of use on interest rates." T. at 116. Weil explained that, even assuming Benson's hourly rate was only the midwest average of $72.50 in 1979, Benson would have to be paid $203 per hour in 1987 (based on the prime rate plus 1%) to be fully compensated for the delay in payment for work done in 1979. T. at 113-114; P.Ex. 5 at p.10.

2. Desegregation Plaintiffs Experience Great Difficulty Obtaining Counsel Without The Prospect of Risk Enhancement.

Max Foust, one of Kansas City's most experienced and respected trial attorneys, Gordon Gee, a Kansas City attorney experienced in complex federal litigation, and Mark Bennett, the leading civil rights private practitioner in Iowa, testified as to the enormous investment required of Benson to litigate this case and the extraordinary and complete preclusion of Benson's law practice for nearly three years. T. at 80-87; Attachments V (Bennett at 3-5) and VII (Gee at 6-7) to Plaintiffs' Brief, filed Jan. 16, 1987. Foust and Gee testified that their law firms would not have undertaken this case due to the economic devastation such preclusion would have had on their firm's overall practice.[1] T. at 87; Attachment VII, supra at 6-7. Bennett testified that

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[1]Foust testified (T. at 88): "[I]t would have presented a matter of such magnitude that it would have destroyed my

his firm, which specializes in civil rights litigation, would not have represented "the plaintiffs without remuneration of a substantial retainer and ongoing payment of my hourly rate of $125.00 per hour." Attachment V, supra at 5-6.[2]

Julius Chambers, Executive Director for the NAACP Legal Defense and Education Fund, testified that this case proved to be the largest and most expensive ever litigated by the LDF. T. at 48. Chambers testified that the LDF's litigation efforts rely heavily on the labors of attorneys in the community in which the litigation occurs. These private

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office and what I do. I mean, I wouldn't have had the personnel, and I have got seven lawyers. I wouldn't even have considered it, as I understand what all went on."

[2]Bennett testified: "In my opinion, this case presented, at the outset, a very substantial degree of risk due to the sheer magnitude and complexity of litigation that is not present in most civil

attorneys, called "cooperating" attorneys, are paid no fees by the LDF. T. at 50. Chambers testified (T. at 51-52):

> We have encountered in recent years some real difficulty in getting cooperating attorneys to become involved with us in cases. * * * In school cases, because school cases take so long and the recoveries are so limited in terms of attorney fees, generally that, we have difficulty in getting cooperating attorneys to become involved in these cases.

3. The Kansas City Market Compensates for Risk in Successful Contingent Fee Cases.

Foust also testified his firm regularly reviews its yield on each case and has made it a practice to maintain

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rights cases. Indeed, the magnitude of this litigation presents such formidable, if not insurmountable, hurdles, I know of no small or mid-size firm, let alone a firm that specializes in civil rights, which would have been in a position to undertake this litigation." Attachment V, supra at 6.

"meticulous [time] records on contingent fees for probably 15 years." T. at 77. Those records showed that the attorneys in Faust's firm have earned fees in successful cases litigated on a contingency fee basis which average $400 to $500 per hour, T. at 78-79, or roughly three to four times what an attorney's hourly billing rate would be in noncontingent cases. T. at 87; see also affidavits of Kansas City attorneys Michael Waldeck (contingency fee compensation is "often three to four times and can be as much as ten times greater than the fee which would be received if the case were billed on an hourly basis") and Ilus Davis, Plaintiffs' Motion for Partial Award of Attorneys' Fees and Expenses, Tab E, filed February, 1986. Faust testified his firm's experience was representative of contingent fee compen-

sation in the Kansas City area. T. at 78-79. Law office economics expert Robert Weil confirmed that the $400 to $500 hourly return from successful contingent fee litigation accurately represented the national experience as well. T. at 117.

C. The District Court Decision

On May 11, 1987, the district court awarded petitioners fees and expenses of $1,614,437 for the work of Benson and his staff on the merits and $72,702 for their work on the fees litigation. 85a. The district court amended its judgment on July 14, 1987 and awarded an additional $42,090 for Year I monitoring fees and expenses. 95a. The total amended fees judgment for Benson's work is $1,729,230.37.[3]

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[3]This judgment includes nearly $55,000 which Benson owes to counsel who assisted

The district court based its fees calculation on hourly rates of $80 for Benson's associates, $40 for Benson's paralegals, and $200 for Benson's personal time (87a - 88a); it awarded the hours requested in their entirety (which reflected the 21% Hensley reduction). The district court stated that the hourly rates awarded Benson included an enhancement to compensate him for the substantial delay in payment, preclusion of other work, and the loss of work due to the undesirability of the case. 51a - 53a. The precise amount of the enhancement was not stated; but the apparent result was a $25-40 per hour increase of Benson's per-

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him on the fees litigation or on part of the merits litigation. 87a - 88a. It also includes nearly $80,500 in reimbursement for direct litigation expenses. 88a - 89a.

sonal hourly rate (and a total enhancement in the range of $125,520 to $200,832). The district court, however, declined to award any contingency enhancement to petitioners for Benson's work on the ground that "plaintiffs' likelihood of success in their claim against the State of Missouri defendants was very high, and thus Benson's risk of nonpayment was very slight". 56a.

D. The Court of Appeals Decision

The court of appeals affirmed the judgment of the district court in all respects. Jenkins by Agyei v. State of Missouri, 838 F.2d 260 (8th Cir. 1988).

The court acknowledged that the "district court's order was entered before the Supreme Court handed down its decision in Pennsylvania v. Delaware Valley

Citizens' Council for Clean Air, __ U.S. __, 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987)(Delaware Valley II)", 38a. The court found that Justice O'Connor's opinion was the touchstone by which to judge contingency enhancement requests. It concluded plaintiffs must prove (1) "that the relevant market compensates for contingency cases as a class, rather than on proof of any particular risks peculiar to the case in question", 39a, and (2) "that 'without an adjustment for risk the prevailing party "would have faced substantial difficulties in finding counsel in the local or other relevant market."'" Id. (quoting J. O'Connor Op. which quoted J. White Plurality Op.).

Although the court recognized Delaware Valley II represented an intervening decision and that the district

court did not apply the correct standard to petitioners' contingency enhancement request, the court declined to reverse or remand:

> [P]laintiffs would have fared no better under Justice O'Connor's analysis, since they failed to adduce proof that they would have faced substantial difficulties finding representation without an adjustment for contingency. While plaintiffs presented evidence that the Kansas City market generally compensates successful attorneys for assuming the risk of contingency cases, they did not introduce any evidence about availability of counsel to plaintiffs in the absence of contingency adjustments. Several attorneys testified that they would not have taken the case at all, and one civil rights litigator testified he would not have taken the case without regular payments. Testimony of these individuals comes short of proof that adjustment for contingency was a crucial factor in plaintiffs' ability to obtain counsel. See generally Blum v. Witco Chemical Corp., 829 F.2d 367, 380-81 (3d Cir. 1987). On the record, we do not discover the proof required by Justice O'Connor as prerequisite for award of a contingency enhancement. See Catlett [v. Missouri

Highway and Transportation Commission, 828 F.2d 1260 (8th Cir. 1987)] at 1271.

40a - 41a.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE CONTINGENCY ENHANCEMENT EVIDENTIARY STANDARD APPLIED BY THE COURT OF APPEALS EITHER CONFLICTS WITH THIS COURT'S DECISION IN DELAWARE VALLEY II, OR, REFLECTING THE EXISTING CONFUSION IN THE LOWER COURTS, REPRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. Introduction

1. Delaware Valley II

In Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, ____ U.S. ___, 107 S.Ct. 3078 (1987)(Delaware Valley II), this Court, on a 4-1-4 vote, reversed a contingency enhancement awarded by the district court for work done in various stages of consent decree enforcement due to the lack of evidentiary justification.[4] Id. at 3091. Although

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[4]A plurality of four justices, in an

joining the plurality in voting to reverse the particular risk enhancement in question, Justice O'Connor voted with the four dissenting justices to create a majority holding that federal fees-shift statutes, such as 42 U.S.C. § 1988, do authorize the "consideration of contingency in setting a reasonable fee" with compensation for contingency to "be based on the differences in market treat-

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opinion by Justice White, rejected the enhancement on three grounds: first, they questioned whether an enhancement for risk was ever appropriate for post-judgment work; second, they concluded that even if a risk enhancement were appropriate, doubling the lodestar was excessive; and third, they found no evidence that without a risk enhancement the plaintiffs would have faced substantial difficulties in finding counsel in the local market. Id. at 3088-89.

Justice O'Connor concurred in the judgment, emphasizing there was no evidence as to whether contingency was enhanced in the local market nor as to whether the large enhancement awarded was necessary to attract competent counsel.

ment of contingent fee cases as a class, rather than on an assessment of the 'riskiness' of any particular case." Id. at 3089 (emphasis in original).

Justice Blackmun, the author of the dissenting opinion, wrote that the district court, in determining whether plaintiffs are entitled to a basic contingency enhancement, must determine "whether a case was taken on a contingent basis, whether the attorney was able to mitigate the risk of nonpayment in any way, and whether other economic risks were aggravated by the contingency of payment." Id. at 3098. Justice O'Connor indicated that she may require a slightly higher threshold showing: "I agree with the plurality that no enhancement for risk is appropriate unless the applicant can establish that without an adjustment for

risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" Id. at 3091.

It can come as no surprise that this Court's splintered, 4-1-4 decision in Delaware Valley II has left considerable uncertainty and confusion. This Court should revisit this unresolved and extremely important area of attorney's fees law. Certiorari is appropriate "[w]hen . . . a federal court of appeals . . . has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court." S.Ct.R. 17.1(c). This is such a case.

2. The "Two Court" Rule Does Not Apply

The instant case involved de novo appellate factual review of petitioners' contingency enhancement request by the Eighth Circuit. The requested enhancement had been denied by the district court in a decision rendered prior to Delaware Valley II, a decision based on criteria the Eighth Circuit acknowledged were inconsistent with Delaware Valley II. 39a - 40a. It is important to note that the Eighth Circuit did not concur in the findings of fact of the district court; rather it made its own findings. 40a - 41a. As a result the "two court" rule that is frequently invoked to deny review of cases that turn on fact finding is not here applicable. See Graver Mfg. Co. v. Linde Co., 336 U.S. 271, 275 (1949).

B. The Court Should Grant Certiorari Because The Court Of Appeals' Decision Denying Plaintiffs A

Contingency Enhancement Squarely Conflicts with Delaware Valley II.

The Eighth Circuit concluded that petitioners satisfied the first prong of Justice O'Connor's standard, finding "that the Kansas City market generally compensates successful attorneys for assuming the risk of contingency cases". 40a. The court, however, concluded petitioners failed to prove "that adjustment for contingency was a crucial factor in plaintiffs' ability to obtain counsel." 41a. It appears decisive to the Eighth Circuit that petitioners "did not introduce any evidence about availability of counsel to plaintiffs in the absence of contingency adjustments." 40a.

The court of appeals' focus, as recognized by at least two courts, runs counter to the fundamental premise of Delaware Valley II. As Judge Parker

instructed in McKenzie v. Kennickell, D.D.C. No. 73-0974 (4-18-88) at page 14:

> It is impossible to demonstrate that plaintiffs actually had difficulty finding counsel without embroiling the courts in an analysis of the riskiness of the particular case. Yet Delaware Valley II resoundingly rejected such an inquiry.

See also Palmer v. Shultz, 679 F.Supp. 68, 75 (D.D.C. 1988), which, on identical reasoning, rejects the defendants' arguments that plaintiffs had failed to make the requisite showing under Delaware Valley II because "none of the affidavits contain any facts indicating that attorneys in the Washington, D.C. community will not take a Title VII case on a straight contingency basis."

Review of the evidence expressly credited by the Eighth Circuit, particularly when considered with the uncontroverted testimony of LDF Executive

Director Julius Chambers as to the difficulties plaintiffs encounter in obtaining counsel in school desegregation cases, confirms petitioners satisfied their evidentiary burden. Although the court credited the testimony of "[s]everal attorneys" that "they would not have taken the case at all", 40a, it declined to state that each testified that taking on such an all-encompassing, mammoth case on a contingent fee basis would break down their small firm practices due to its preclusion of all other work. The court did note that "one civil rights litigator" testified that "he would not have taken the case without regular payments", 40a - 41a, but it failed to appreciate the significance of that testimony. Furthermore, the court failed to acknowledge the testimony of Julius Chambers, the

respected Executive Director of the LDF, that it has become very difficult for the LDF to secure private practitioners as cooperating counsel in school desegregation cases because of the uncertainty of recovering a fully compensatory fee even when one prevails. "Statement of the Case," supra at 13 - 14.

In sum, the Court of Appeals failed to draw the obvious and compelling factual conclusion: there have been and continue to be very few private practitioners anywhere who will provide plaintiffs with representation in a school desegregation case; there are even fewer who will do so on a contingent fee basis; and, of those few who would provide representation on a contingent fee basis, they rightfully expect to receive a very substantial enhancement of their normal hourly rate

should plaintiffs prevail after years of bitterly contested litigation. There is no scope of review standard which requires the Supreme Court to be blind to that which all the world knows.

This was an extraordinary case by any measure. It required extraordinary lawyering and leadership. It required an extraordinary commitment of resources. It achieved exceptional results -- far-reaching relief that promises equal educational opportunity for the black children of Kansas City and significant reduction of their racial isolation. The leader of this entire effort was Kansas City practitioner Arthur Benson, who made a financial and personal commitment to this litigation unprecedented in the reported fees decisions. The uncontroverted facts are that in addition to a

total personal and professional commitment to this case for three consecutive years of full-time work, Benson worked substantial portions of five additional years and went over $730,000 in debt in order to litigate this case successfully.

Although petitioners did not have the benefit of Delaware Valley II when they made their evidentiary presentation, their case for a risk enhancement is compelling. Although, as petitioners demonstrate in the subsequent section, Delaware Valley II did not limit contingency enhancements to the exceptional or rare case, petitioners submit their evidentiary showing satisfies the most stringent of standards.

Finally, petitioners would note that the record in the instant case would permit the Court not only to resolve the standard which must be met to establish

entitlement to a risk enhancement, but also to instruct as to the calculation of such enhancements when entitlement has been established. Petitioners presented extensive market-based evidence on this latter question, which was summarized in the "Statement of the Case," supra at 14-16. In sum, that uncontroverted Kansas City market evidence showed the average hourly return on successful contingent fee cases is $400-500, an amount which Robert Weil confirmed was consistent with the national market. Petitioners' enhancement request for Benson's work was at the bottom end or below the Kansas City market range.

C. The Court Should Grant Certiorari Because The Evidentiary Standard To Establish Entitlement To A Contingency Enhancement, As Fashioned By The Court Of Appeals, Permits Enhancement Only In The Rare Or Exceptional Case, A Standard Far More Stringent Than

And In Conflict With This Court's Decision In Delaware Valley II.

The courts of appeals which have had occasion to apply Delaware Valley II agree that it authorizes a contingency enhancement in appropriate cases. However, there the consensus stops.

The Third, Fourth, Fifth, Eighth, District of Columbia and Federal Circuits have concluded that Justice O'Connor's opinion effectively establishes the standard for the Court. Blum v. Witco Chemical Corp., 829 F.2d 367, 379-382 (3d Cir. 1987); Spell v. McDaniel, 824 F.2d 1380, 1404 n.23 (4th Cir. 1987); Leroy v. City of Houston, 831 F.2d 576, 583-84 (5th Cir. 1987); Jenkins v. State of Missouri, supra; Thompson v. Kennickell, 836 F.2d 616,621 (D.C.Cir. 1988); Crumbaker v. Merit Systems Protection Board, 827 F.2d 761 (Fed.Cir. 1987). These courts read

Justice O'Connor's opinion to require the plaintiffs to prove (1) that the relevant legal market compensates contingency cases differently from non-contingency cases, and (2) that absent the prospect for an enhancement, the plaintiffs would have faced substantial difficulty in securing counsel.

While the Third Circuit in Blum, supra, frankly acknowledges the confusion left by Delaware Valley II as to the required evidentiary showing for a contingency enhancement, see Section I(E) infra, it and the five other courts adopting Justice O'Connor's standard appear uniform in their belief that it permits risk enhancements only in the "exceptional" or "rare" case. Such is the express holding of the Third, Fifth and District of Columbia Circuits. Blum,

supra at 380 n.13; Student Public Interest Research Group of New Jersey, Inc. et al. v. AT&T Bell Laboratories, 842 F.2d 1436, 1452 (3d Cir. 1988); Coup v. Heckler, 834 F.2d 313,324 (3d Cir. 1987); Leroy, supra at 583-84 (contingency award "reserved for 'exceptional cases'"); Thompson v. Kennickell, supra at 621. See also Norman v. Housing Authority of City of Montgomery, 836 F.2d 1291, 1302 (11th Cir. 1988)("the rare case"). Although the Eighth Circuit did not choose to characterize the burden of proof imposed by Justice O'Connor's standard, its grudging rejection of plaintiffs' factual showing in the instant case confirms its accord.

Petitioners submit that had Justice O'Connor intended that contingency enhancement only be available in the rare

or exceptional case, she would have clearly so stated. Her decision not to use such restrictive language takes on particular significance when it is recalled that in Pennsylvania v. Delaware Valley Citizens Council for Clear Air, __ U.S.__, 106 S.Ct. 3088 (1986)(Delaware Valley I), this Court expressly reaffirmed its position that upward adjustments of the lodestar based on the quality of the legal services provided "are proper only in certain 'rare' and 'exceptional' cases, supported by both 'specific evidence' on the record and detailed findings by the lower courts." Id. at 3098; see also Blum v. Stenson, 465 U.S. 886, 899 (1984). The Delaware Valley II standard for contingency enhancement is clearly not as restrictive as the Delaware Valley I standard for quality enhancement.

Petitioners contend that the Eighth Circuit committed plain error in its evaluation of petitioners' evidentiary showing under Justice O'Connor's 2-prong standard, an error influenced by its mistaken view that Delaware Valley II permits risk enhancement only in exceptional or rare cases. Because of the importance of this question of federal law and the likelihood of frequent repetition of this error, this Court should grant certiorari to resolve the conflict and settle the law. In doing so, this Court would also surely settle a related aspect of risk enhancement law which is still in a state of considerable confusion.

D. There Is Confusion And Conflict Among The Circuits As To Whether The Individual Case's Likelihood Of Success, The Factor Upon Which The District Court Denied Petitioners' Contingency Enhancement, Remains A Relevant Consideration After Delaware Valley II.

The six circuits that have adopted Justice O'Connor's standard, see Section I(C), supra, appear unanimous that the plaintiff's likelihood of success on the merits of the particular case was rejected as a relevant factor in Delaware Valley II. See, e.g., Spell v. McDaniel, supra at 1405; Thompson v. Kennickell, supra at 621; Jenkins v. Missouri, supra at 268. However, there are three circuits which take a different tack, creating a 6-3 split within the circuits on this point.

The First, Second and Sixth Circuits have not adopted Justice O'Connor's standard and have continued to base post-Delaware Valley II contingency enhancement decisions in part on their evaluation of the particular risks posed by the case. Jacobs v. Mancuso, 825 F.2d 559, 561 (1st Cir. 1987)(denying

enhancement on ground that "liability here was so plain . . . that, as a practical matter, the risk of not recovering a fee was all but eliminated"); Friends of the Earth v. Eastman Kodak Co., 834 F.2d 295, 298 (2d Cir. 1987)(denying enhancement because "the risks to plaintiffs' counsel appear slight", expressly noting there was no trial); Conklin v. Lovely, 834 F.2d 543, 553 (6th Cir. 1987)(quoting approvingly from Northcross v. Bd. of Ed. of Memphis City Schools, 611 F.2d 624, 638 (6th Cir. 1979, cert. denied, 447 U.S. 911 (1980), a test emphasizing the likelihood of success in the particular case).

This Petition assumes the correctness of the Eighth Circuit ruling that the legal risks peculiar to the particular case are irrelevant to determination of entitlement to a contingency enhancement,

and will focus principally on the need for this Court to settle the important question as to the plaintiffs' evidentiary burden to establish entitlement to the enhancement. Nonetheless, further evidence of the urgency for a Supreme Court decision settling this important area of civil rights law is the conflict which exists within the circuits as to the relevance of the legal risks peculiar to the particular case.

E. The Court Should Grant Certiorari Because The Evidentiary Standard Which Plaintiffs Must Meet In Order To Establish Entitlement To A Contingency Enhancement Is An Important Question Of Federal Law Which Has Not Been, But Should Be, Settled By This Court.

Petitioners submit that the Eighth Circuit badly misconceived the plaintiffs' evidentiary burden under Delaware Valley

II, an error which will undoubtedly be repeated and compounded in many circuits if not corrected by this Court. The Eighth Circuit's cursory decision is not aberrational, but rather manifests the confusion within the lower federal courts as to the application of Justice O'Connor's standard. The uncertainty spawned by Delaware Valley II was evident immediately to those litigants and courts familiar with fees law, a fact pointedly made in one of the first post-Delaware Valley II decisions.

The Third Circuit in Blum v. Witco Chemical Corp., 829 F.2d 367 (3d Cir. 1987), was openly critical of the ambiguities of Justice O'Connor's standard. It observed at the outset that the calculation of any contingency multiplier had been made "a daunting task indeed" as a result of Delaware Valley II:

> The 4-1-4 division makes it difficult to identify the reasoning or derive guidance from the various alliances the court formed to reach its holdings. In addition, the opinions themselves, insofar as they add up to five votes on the critical points, do not present clear mandates. Most difficult of all, the district court must tackle the task of translating the court's message into a blueprint for an evidentiary hearing, and make findings that will satisfy the DVCCCA II rule. Although we could pretermit this discussion and merely remand the counsel fee question to the district court for further consideration in light of DVCCCA II, awaiting development of a full record in this or some other case on appeal before coming to grips with some of the difficult problems that DVCCCA II poses, bearing in mind that counsel fee litigation is daily fare these days, our concern for the problems that will be faced day in and day out by the district judges within the circuit in the wake of DVCCCA II compels us to say something on the issue now.

Id. at 380.

The Third Circuit proceeded to comment on some of the gray areas left by Delaware

Valley II. The Court speculated as to whether it would be necessary for plaintiffs to utilize an expert economist to develop an econometric model, at a cost of "tens of thousands of dollars". Id. at 381. It also pointed out:

> "[S]uch a study would address only one side of Justice O'Connor's inquiry, for it says nothing about the question whether the multiple is necessary to attract competent counsel. ___ U.S. at ___, 107 S.Ct. at 3089-3090. How that question is to be answered--short of estimating the supply curve for plaintiff's legal services in these cases--is equally unclear. An econometric answer here would also be extremely expensive. The district court may wish to consider whether such studies are feasible and whether there are alternatives that will meet the DVCCCA II test."

Id. at 381.

No district court decision awarding a contingency enhancement based on Delaware Valley II standards has yet been reviewed

by a court of appeals. However, there are at least four prominent district court decisions which have awarded substantial contingency enhancements on essentially the same evidentiary showing rejected by the Eighth Circuit in the instant case.

All four cases were Title VII employment discrimination cases; three were class actions. Each expressly followed Justice O'Connor's standard. Hidle v. Geneva County Bd. of Educ., 681 F.Supp. 752 (M.D.Ala. 1988)(contingency enhancement of 100%, nearly $85,000); Palmer v. Shultz, 679 F.Supp. 68 (D.D.C. 1988)(contingency enhancement of 50%, $71,806); McKenzie v. Kennickell, D.D.C. No. 73-0974 (4-18-1988)(contingency enhancement of 50%, $345,000); Black Grievance Committee v. Philadelphia Electric Co., E.D.Pa. No. 75-3156

(6-20-1988)(contingency enhancement of 200%, $200,000). These courts based enhancement on the following evidence:

1. attorneys who take cases on a contingent fee basis expect to earn a higher hourly fee upon success than when paid regularly on a non-contingent fee basis;

2. the hourly return on successful contingent fees cases is generally at least double or triple that earned on a non-contingent hourly basis and often approaches $500 per hour;

3. it has become increasingly difficult for plaintiffs in civil rights cases to obtain counsel on a contingent fee basis because the economic risks assumed have not been adequately compensated:

a. many attorneys have cut back substantially on the civil rights portion of their practice; and

b. bar referral services are experiencing considerable difficulty in securing counsel for civil rights complainants.

The court in Palmer v. Shultz, supra at 75, summarized:

> It is clear therefore that the unavailability of contingency enhancements, combined with the demanding and protracted nature of Title VII class action litigation, would make it economically unfeasible for a great majority of attorneys to undertake such cases on a purely contingent basis.

Petitioners acknowledge that this conflict between these four district court opinions and the Eighth Circuit's ruling does not in itself present an independent basis for certiorari review, but it does confirm the Third Circuit's prediction in Blum that lower court confusion and disagreement would be considerable until this Court provides further guidance.

Confusion and disagreement breed litigation, a particularly unsatisfactory result in an area of the law that this Court has counseled should not become "second major litigation."

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

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88-50

No. 87-

Supreme Court, U.S.
FILED
JUL 9 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1987

KALIMA JENKINS, *et al.*,
Petitioners,

-v-

THE STATE OF MISSOURI, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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UNITED STATES COURT OF APPEALS

FOR THE EIGHTH CIRCUIT

No. 87-2075

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated; *

*

and *

*

American Federation of Teachers, Local 691, *

*

v. *

*

The State of Missouri; Honorable John Ashcroft, Governor of the *

State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education
Roseann Bentley,
Dan Blackwell,
Terry A. Bond, President
Delmar A. Cobble,
Grover Gamm,
Jimmy Robertson,
Robert L. Welling,
Donald E. West,
Members of the Missouri State Board of Education,
Arthur L. Mallory, Commissioner of Education of the State of Missouri,
Appellees,

and

School District of Kansas City, Missouri,
Appellant,

and Claude C. Perkins, Superintendent thereof.

Appeals From the United States District Court for the Western District of Missouri

---

No. 87-2076

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by

her next friend, Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell, by his next friend, Maurice Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;

Appellees,

and

American Federation of Teachers, Local 691,

v.

The State of Missouri; Honorable John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education
Roseann Bentley,
Dan Blackwell,
Terry A. Bond, President
Delmar A. Cobble,
Grover Gamm,
Jimmy Robertson,

Robert L. Welling, *
Donald E. West, *
Members of the Missouri *
State Board of Education, *
Arthur L. Mallory, Commissioner *
of Education of the State of *
Missouri, *
*
Appellants, *
*
and *
*
School District of Kansas City, *
Missouri, *
*
and Claude C. Perkins, *
Superintendent thereof, *
*
Appellee.

No. 87-2077

Kalima Jenkins, by her friend, *
Kamau Agyei; Carolyn Dawson, by *
her next friend, Richard Dawson; *
Tufanza A. Byrd, by her next *
friend, Teresa Byrd; Derek A. *
Dydell, by his next friend, *
Maurice Dydell; Terrance Cason, *
by his next friend, Antoria *
Cason; Jonathan Wiggins, by his *
next friend, Rosemary Jacobs *
Love; Kirk Allan Ward, by his *
next friend, Mary Ward; Robert *
M. Hall, by his next friend, *
Denise Hall; Dwayne A. *

Turrentine, by his next friend, Shelia Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves and all others similarly situated;

Appellants,

and

American Federation of Teachers, Local 691,

v.

The State of Missouri; Honorable John Ashcroft, Governor of the State of Missouri; Wendell Bailey, Treasurer of the State of Missouri; Missouri State Board of Education
Roseann Bentley,
Dan Blackwell,
Terry A. Bond, President
Delmar A. Cobble,
Grover Gamm,
Jimmy Robertson,
Robert L. Welling,
Donald E. West,
Members of the Missouri State Board of Education,
Arthur L. Mallory, Commissioner of Education of the State of Missouri,

Appellees,

and

School District of Kansas City, Missouri,

and Claude C. Perkins, Superintendent thereof. *

Submitted: October 13, 1987

Filed: January 29,,1988

Before LAY, Chief Judge, HEANEY and JOHN R. GIBSON, Circuit Judges.

JOHN R. GIBSON, Circuit Judge.

The award of attorneys' fees in the Kansas City, Missouri school desegregation case has resulted in this trio of appeals. The district court[1] awarded plaintiffs' co-counsel, Arthur Benson, and the Legal Defense Fund of the NAACP (LDF) fees and expenses for services rendered in the litigation, imposed solely against the State of Missouri. The district court denied the application of the Kansas City, Missouri School District (KCMSD) for

attorneys' fees. On appeal the State of Missouri argues that the district court award compensated plaintiffs' counsel for time spent on unsuccessful claims and the fee should have been reduced because of plaintiffs' partial success; that there was error in awarding an hourly rate based upon a delay in payment factor because this is an award of interest against the State prohibited by the eleventh amendment; that 50 percent of the fee should have been imposed on KCMSD; and that the fees and expenses were unreasonable. KCMSD argues that as a party seeking to enforce the civil rights laws through litigation and as a prevailing party, it was eligible for an award of attorneys' fees. Plaintiffs argue that the district court erred in not enhancing their fee to

compensate for the risk plaintiffs' counsel assumed. The judgment of the district court is affirmed.

The school desegregation case was filed in 1977 and the history of this litigation is outlined with a broad brush in this court en banc's opinion. Jenkins v. State of Missouri, 807 F.2d 657, 661-62 (8th Cir. 1986) (en banc), cert. denied, 108 S. Ct. 70 (1987). Plaintiffs submitted a detailed application for fees under 42 U.S.C. § 1988 (1982).[2] The State filed a response cataloging specific items in the fee applications it deemed excessive, and the plaintiffs responded with an item-by-item rebuttal of the State's objections. Evidence was presented at a hearing.

The district court recognized that plaintiffs are entitled to attorneys' fees

if they succeeded on any significant issue in the litigation. It found the plaintiffs were undisputedly prevailing parties.

The district court based its fee calculation on the number of hours and amount of expenses the plaintiffs submitted. The plaintiffs had cut their total hours to delete time spent on unsuccessful interdistrict claims against federal, Kansas and suburban school district defendants. The court adopted the plaintiffs' adjusted request as the basis for the number of reasonable hours, rejecting the State's arguments for further cuts because it found that the remaining hours were either expended solely on the successful claims or were "so closely interrelated" with them "that

they cannot be separated or reduced by some arbitrary percentage." Jenkins v. Missouri, No. 77-0420-CV-W-4, slip. op. at 3 (W.D. Mo. May 11, 1987).

The district court concluded that the hours submitted by the plaintiffs after their suggested reductions for time spent on unsuccessful claims represented the time reasonably spent on this litigation, except for 3.5 of the hours requested for LDF attorney Liebman. The court also determined that the hours and expenses submitted by LDF and Benson for litigating fee requests were reasonable and allowed the expenses and a fee based on the hours submitted.

The court then turned to the determination of an hourly rate. It found

that Benson's rate would fall at the higher end of a range of $125 to $175 per hour. In doing so it considered the attorney's customary fee, his experience, reputation and ability. In addition, because the application was for services rendered from March, 1979 through June, 1986, the court deemed it essential that the hourly rate include compensation for the delay in payment. In light of delay, preclusion from other employment and the undesirability of the case, the court determined that an hourly rate of $200 per hour was reasonable.

The court determined the applicable rate for LDF's fees to be that of the locality of the litigation, Kansas City, rather than New York. It determined that a fee was appropriate for the represen-

tation by non-profit counsel and considering compensation for delay in payment awarded LDF fees at the current rather than historical rates.

The court rejected plaintiffs' claims for enhancement of the fee for quality of representation and risk of non-payment, finding that the quality of representation was included in the determination of the hourly rate. It rejected the argument that there should be upward adjustment for risk of loss because it found the plaintiffs' likelihood of success in their claim against the State was very high, the risk of non-payment slight, and the small risk of non-payment was fully reflected in the reasonable attorneys' fee calculated by the court.

The district court awarded Benson and his staff a total of $1,687,139.92 for fees and expenses rendered from March 1979 to June 30, 1986, and for the fees and expenses incurred in litigating the fee application. As Benson had received $347,332.93 of this amount, the balance due was stated to be $1,339,806.99. The court awarded LDF a total of $2,323,730.60 for fees and expenses through May 31, 1985, and $42,145.14 for litigation of the fees and expenses issue.

The court amended its order on July 14, 1987 to include an additional $37,950.00 fee award to Benson for monitoring the remedial plan in 1985-86, based on an hourly rate of $125 per hour for Benson, and $3,478.00 in expenses so incurred.

In ruling on KCMSD's fee application, the court noted that it had found in favor of KCMSD on its cross-claim against the State of Missouri, but that the cross-claim simply reiterated plaintiffs' allegations and that the same remedial plans would have been ordered even if KCMSD had not reiterated plaintiffs' allegations in its cross-claim. The district court also observed that KCMSD was adjudged liable and ordered to pay 50 percent of the costs of the remedy. See Jenkins, 807 F.2d at 684-85. It concluded that because KCMSD had violated the constitution by adopting policies which perpetuated rather than eliminated segregation, it was inappropriate to award attorneys' fees to a constitutional violator.

In determining who should pay the plaintiffs' fee, the court observed that the State of Missouri was the primary constitutional violator. Moreover, the district court noted that KCMSD had cooperated closely with the plaintiff and in fact had originally been a plaintiff before the court realigned it as a defendant in 1978. Also, KCMSD had admitted liability prior to trial, while the State had persisted in denying liability throughout the ten and a half month trial on liability issues. Accordingly, the court concluded that KCMSD would not be liable for the attorneys' fees and expenses and that the award of fees should be imposed solely against the State.

Before we consider the contentions of the parties with respect to the fee, we

reiterate the concern of the Supreme Court in Hensley v. Eckerhart, 461 U.S. 424 (1983), that the attorneys' fee issue should not result in a second major litigation and that ideally the litigants will settle the amount of the fee. Id. at 437.

I. Missouri's Appeal.

The State first argues that the district court erred in compensating the plaintiffs for time spent on the unsuccessful claims against prevailing defendants and in failing to further reduce the compensable hours due to plaintiffs' partial success as compared to the scope of the litigation as a whole. The State points out that the district court accepted the Hensley reductions made by

plaintiffs, which resulted in a fee based on roughly 85 percent of the total hours worked, in spite of plaintiffs' lack of success on their interdistrict claim.

Hensley v. Eckerhart provides the guidance for setting fee awards in cases where plaintiffs were less than totally successful:

> Where the plaintiff has failed to prevail on a claim that is distinct in all respects from his successful claims, the hours spent on the unsuccessful claim should be excluded in considering the award of a reasonable fee. Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

461 U.S. at 440.

In this case, the plaintiffs made unsuccessful claims against the State as well as the suburban, federal, and Kansas defendants for interdistrict relief. They also made successful intradistrict claims against the State and KCMSD. The district court found that the plaintiffs appropriately excluded hours that did not relate to the claims on which plaintiffs prevailed, and that the remaining hours either related solely to the successful claims or related to them as well as to unsuccessful claims and the time could not be set aside as devoted to the unsuccessful claims. This allocation of hours among the various claims is a finding of fact, which we can reverse only if clearly erroneous. See City of Riverside v. Rivera, 477 U.S. 561, 106 S. Ct. 2686,

2693 (1986); 106 S. Ct. at 2699 (Powell, J. concurring).

The State argues that reduction of the hours worked by only about 15% cannot be an adequate reduction for the time spent on claims against prevailing defendants. It is true that much of the testimony and much of the effort at trial was pointed toward relief that was not obtained. Our acquaintance with the record in this case from consideration of the appeal on the merits convinces us that many of the issues were separate in nature, but also that a substantial portion of the testimony that bore upon the unsuccessful claims was closely interrelated with the remaining claims. The parties briefed this question in detail before the trial court, explaining why they believed each

time entry was or was not compensable. Were we to fix the initial percentage reduction of the time spent by plaintiffs' counsel, we might not have arrived at the same result as the district court. However, upon review of the record, we cannot say that the district court's finding was clearly erroneous, and we may not substitute our own findings for those of the district court. See Anderson v. City of Bessemer City, 470 U.S. 564, 105 S. Ct. 1504 (1985).

The state argues that the district court failed to consider the degree of success obtained as required by Hensley. While the district court could have been more explicit in this respect, we are satisfied that the parties forcefully brought to the attention of the district

court the analysis required by Hensley and that the district court faithfully applied Hensley in awarding the fee. In focussing on the time relating solely to the successful claims or so closely interrelated to those claims that it could not be separated or reduced and determining a reasonable fee, the district court gave proper weight to the degree of success. See McCurry v. Tesch, 824 F.2d 638, 642 (8th Cir. 1987).

The State's proposed second reduction would amount to a double deduction by taking away hours relating to the successful claim because of unsuccessful ones, which have already been the subject of reduction. "A court should not disallow attorney hours related and necessary to successful claims." Catlett v. Missouri

Highway and Transportation Commission, 828 F.2d 1260, 1270 (8th Cir. 1987); see Carmichael v. Birmingham Saw Works, 738 F.2d 1126, 1137 (11th Cir. 1984). A second Hensley deduction is not appropriate. Accord Rogers v. Okin, 821 F.2d 22, 25, 29 (1st Cir. 1987), petition for cert. filed (Nov. 3, 1987) (district court correctly deleted only time wholly unrelated to successful claim).

The State next argues that the district court erred in considering delay in payment as a factor in setting plaintiffs' attorneys' hourly rates. The State relies on Library of Congress v. Shaw, ____ U.S., ____, 106 S. Ct. 2957 (1986), and Rogers v. Okin, 821 F.2d 22 (1st Cir. 1987), for the proposition that the district court's consideration of delay

constituted an award of interest that violated the eleventh amendment. We are not persuaded by this argument.

Shaw involved an award of attorneys' fees in a Title VII case against the federal government, in which the district court increased the lodestar by 30% to compensate for delay in payment. The Supreme Court reversed on the grounds that the award of interest on the fees was forbidden by the "no-interest" rule, which requires a specific waiver of the federal government's sovereign immunity with regard to interest, in addition to the waiver of immunity on the underlying cause of action.

In Rogers the First Circuit analogized from Shaw to forbid an award of fees

against a state based on current hourly rates. 821 F.2d at 26-28. We cannot agree with the Rogers court that the holding in Shaw is applicable in a case involving eleventh amendment, rather than federal sovereign immunity, or to a case where the court awards current rates or considers delay as one factor in setting a compensatory fee award.

First, Shaw was expressly based on the "no interest" rule of statutory interpretation applicable in suits against the federal government. 106 S. Ct. at 2962--63. Rogers does not explain why it considers Shaw's federal sovereign immunity holding applicable in an eleventh amendment setting, and indeed Rogers acknowledges that the two areas of law carry "different standards of statutory

interpretation." 821 F.2d at 27. We see no reason to extend Shaw to the body of eleventh amendment law, which was not covered by its rationale.

Second, Rogers assumes that compensation for delay equates with prejudgment interest, and we are not satisfied that it does. Shaw leaves open a distinction between a separately stated enhancement for delay, such as the thirty percent enhancement in Shaw, which it regarded as interest, and merely considering delay as one factor in setting the hourly fee, as the district court did in this case. Judge Ginsburg dissented from the Court of Appeals decision allowing interest in Shaw, Shaw v. Library of Congress, 747 F.2d 1469, 1485-93 (D.C. Cir. 1984), arguing that "use of current rather than

the historical hourly rates in order to compensate for delay, or use of historical rates that were based on expected delay . . . would not run afoul of the no-interest rule." 106 S. Ct. at 2961 (summary by Blackmun, J.). In the Supreme Court's opinion, Justice Blackmun adverted to Judge Ginsburg's dissent without disapproval. Id.

At any rate, the eleventh amendment is not a barrier to recovery of fees against a state under section 1988, see generally Hutto v. Finney, 437 U.S. 678, 693-94 (1978), and the courts have regularly interpreted section 1988 to permit compensation for delay in the payment of fees, e.g., Sisco v. J.S. Alberici Construction Co., 733 F.2d 55, 59 n.3 (8th Cir. 1984); Grendel's Den, Inc. v.

Larkin, 749 F.2d 945, 951, 955 (1st Cir. 1984); Daly v. Hill, 790 F.2d 1071,1081 (4th Cir. 1986); Lightfoot v. Walker, 826 F.2d 516, 523 (7th Cir. 1987); Jordan v. Multnomah County, 815 F.2d 1258,1262-63 n.7 (9th Cir. 1987); Ramos v. Lamm, 713 F.2d 546, 555 (10th Cir. 1983); Gaines v. Dougherty County Board of Education, 775 F.2d 1565, 1572 (11th Cir. 1985). In Pennsylvania v. Delaware Valley Citizens' Council, 107 S. Ct. 3078, 3081-82, 3099 (1987), both the majority and dissenting justices seem to have approved award of delay compensation under the "typical fee-shifting statute." But the Rogers court premised its holding on its conclusion that § 1988 does not permit compensation for delay: "Our problem in the instant case is that Congress has not yet made any

statement suggesting that a § 1988 attorney's fee award should include prejudgment interest." 821 F.2d at 27. The Rogers court's decision that section 1988 does not permit delay compensation runs counter to the generally accepted view of that statute, and we will not disregard the established body of section 1988 law.

We hold that the district court properly considered delay in establishing the hourly rate.

The State also argues that the district court erred in allowing fees for paralegals and law clerks in excess of $15 per hour, which the State "suggests" is the cost to plaintiffs' attorneys of hiring the clerks and paralegals. We recognize that other courts have

approached this question differently, some viewing paralegal work as a cost to be reimbursed and others as a portion of the fee, to be given market treatment. This circuit has not resolved this question, although we have stated that "[p]aralegal fees should be allowed if reasonable and not duplicative of other legal fees." Hawkins v. Anheuser-Busch, Inc., 697 F.2d 810, 817 (8th Cir. 1983). We believe that market considerations should govern, but it is not necessary to adopt an ironclad rule in this case. Suffice it to say that the district court found that $40 per hour for paralegals and $35 per hour for law clerks were reasonable fees, slip op. at 7, and we cannot say its determination was clearly erroneous.

The State raises numerous other issues dealing with granting plaintiffs'

excessive hourly billing rates and litigation expenses, particularly expert witness fees for James Anderson. While we acknowledge that some of the State's arguments have some force, we conclude that the district court's determinations in these respects were not clearly erroneous.

In its appeal against the KCMSD the State argues that the district court erred in failing to impose 50 percent of the liability for fees and expenses on KCMSD[3]

The district court justified the allocation of the fee by pointing to its earlier conclusion that the State of Missouri was the primary constitutional violator. By contrast KCMSD did not cause the unlawful segregation but simply failed, as did the State, to disestablish the dual school

system created by the State of Missouri and adopted policies which were ineffective in eliminating the unlawful segregation. Moreover, the court pointed to the fact that KCMSD had cooperated with the plaintiffs and had conceded liability prior to trial, while the State denied liability, thereby contributing to the necessity of a ten and a half month trial. Thus, in effect the district court concluded that KCMSD minimized the need for plaintiffs to incur attorneys' fees, while the State maximized the need.

The district court based its award on the defendants' relative degrees of culpability and the time the plaintiffs were forced to spend litigating against the respective defendants. Both factors are appropriate considerations in deter-

mining who must shoulder the fees award. See Rose v. Nebraska, 748 F.2d 1258, 1264 (8th Cir. 1984), cert. denied, 474 U.S. 817, 106 S. Ct. 61 (1985), and Charles v. Coleman, 689 F.2d 774, 777 (8th Cir. 1982) (degree of liability considered in allocating responsibility for fees); Grendel's Den, Inc. v. Larkin, 749 F.2d 945, 960 (1st Cir. 1984); Southeast Legal Defense Group v. Adams, 657 F.2d 1118, 1125-26 (9th Cir. 1981) (relative time); see generally Little Rock School District v. Pulaski County Special School District No. 1, 787 F.2d 372, 374 (8th Cir.) (Arnold, J., concurring and dissenting), cert. denied, 106 S. Ct. 2926 (1986) (relative culpability and relative litigation time relevant).

The State argues that fees should be

allocated in the same percentages as liability for the costs of the substantive relief. However, the criteria for liability on the merits and for liability for fees are different--obviously, the court could not consider the amount of time spent litigating against the respective defendants when it apportioned liability for the substantive relief, but that is an appropriate consideration in apportioning liability for fees.

The district court's allocation of fees is reversible only in the event of abuse of discretion. See Adams, 657 F.2d at 1126. The reasons given by the district court in this case adequately supported its decision to place responsibility for the fees on the State.

II. KCMSD'S Appeal

We reject KCMSD's argument that it is entitled to attorneys' fees. In essence, the district court concluded that KCMSD in its cross-claim against the State simply reiterated claims made by the Jenkins class and insofar as KCMSD had been improved by the remedial plans, these plans would have been ordered as a result of plaintiffs' claims regardless of KCMSD's cross-claim. In addition, KCMSD had been adjudged a constitutional violator and the court determined it was therefore inappropriate to award it attorneys' fees. Under section 1988 a prevailing plaintiff is entitled to an award of attorneys' fees "'unless special circumstances would render such an award unjust.'" S. Rep. No. 94-1011, 94th Cong.

2d Sess. 4, reprinted in 1976 U.S. Code Cong. & Admin. News 5908, 5912. Though a district court's discretion in determining when such special circumstances exist is narrowly limited, see New York Gaslight Club, Inc. v. Carey, 447 U.S. 54, 68 (1980) (title VII), the district court did not abuse its discretion in finding them here.

KCMSD cites our case of United States v. Arkansas, 791 F.2d 1573 (8th Cir. 1986), in support of its argument that the court should not have considered KCMSD's role as constitutional violator in determining that special circumstances would make an award of attorneys' fees in favor of KCMSD unjust. There, while the school districts had been held liable, the district court attempted to assess the

entire cost of consolidating against the state, based on a finding that gerrymandering had resulted from the requirements of Arkansas law mandating segregation. 791 F.2d 1575. In contrast to the situation assumed in United States v. Arkansas, in this case KCMSD was not only liable, but this court determined it was appropriate for KCMSD to pay 50% of the costs of the remedy. Jenkins, 807 F.2d at 684-86. Under these circumstances, the district court acted within its discretion in determining that it would be unjust to award KCMSD its fees against the State.

III. Plaintiffs' Appeal.

Plaintiffs argue that they are entitled to an enhancement of the fee awarded for Attorney Benson on the grounds

that he is entitled to compensation for litigating the case on a contingency basis.

The district court's order was entered before the Supreme Court handed down its decision in Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, _____ U.S. _____, 107 S. Ct. 3078 (1987) (Delaware Valley II), which clarified the prerequisites for enhancement of a fee award for contingency. There was no majority opinion in Delaware Valley II, but Justice O'Connor's concurrence in judgment formed a majority for the holding that a contingency enhancement would be permissible in some circumstances, and another majority for the holding that such circumstances did not exist in the Delaware Valley II case. Justice O'Connor

stated that contingency enhancements should be awarded only on proof that the relevant market compensates for contingency cases as a class, rather than on proof of any particular risks peculiar to the case in question. 107 S. Ct. at 3090-91. Specifically, Justice O'Connor would require proof that "without an adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" Id. at 3091 (quoting plurality opinion, 107 S. Ct. at 3089).

The district court in this case denied plaintiffs a contingency enhancement based on the plaintiffs' high likelihood of success in the particular substantive case at bar; the court's criteria were not those adopted by Justice O'Connor, who

disapproved enhancement decisions based on "legal risks" peculiar to a particular case. However, plaintiffs would have fared no better under Justice O'Connor's analysis, since they failed to adduce proof that they would have faced substantial difficulties finding representation without an adjustment for contingency. While plaintiffs presented evidence that the Kansas City market generally compensates successful attorneys for assuming the risk of contingency cases, they did not introduce any evidence about availability of counsel to plaintiffs in the absence of contingency adjustments. Several attorneys testified that they would not have taken the case at all, and one civil rights litigator testified he would not have taken the case without

regular payments. Testimony of these individuals comes short of proof that adjustment for contingency was a crucial factor in plaintiffs' ability to obtain counsel. See generally Blum v. Witoco Chemical Corp., 829 F.2d 367, 380-81 (3d Cir. 1987). On the record, we do not discover the proof required by Justice O'Connor as prerequisite for award of a contingency enhancement. See Catlett, 828 F.2d at 1271.

Plaintiffs also argue that they should receive enhancement for the risk inherent in this particular case in accordance with the Delaware Valley II views of Justice Blackmun. However, Justice O'Connor disapproved Justice Blackmun's suggestion of enhancement for extraordinary legal risk in a particular case, 107 S. Ct. at

3090, and therefore Justice Blackmun's views did not command a majority of the Court. Furthermore, the district court specifically held that this case did not involve extraordinary risk of failure and this finding is not clearly erroneous. Therefore, even under Justice Blackmun's views, the plaintiffs are not entitled to a contingency enhancement for extraordinary risk in this case. The judgment of the district court is affirmed in all respects.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KALIMA JENKINS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No.77-0420-CV-W-4
	)	
STATE OF MISSOURI, et al.	)	
	)	
Defendants.	)	

ORDER

Several motions for awards of attorney's fees and expenses are presently before the Court. Plaintiffs' co-counsel, Arthur Benson, has moved for $3,310,587.00 in fees and expenses for services rendered by him and his staff through June 30, 1986. The Court will award Mr. Benson and his staff $1,614,437.43 for these services. Having previously received $347,332.93 of this amount, the balance due Mr. Benson for these services is

$1,267,104.50. In addition, Benson has requested $72,702.49 in fees and expenses incurred in litigating his fee application. The Court will award this amount. The Legal Defense Fund (LDF), co-counsel for the plaintiffs in this case, moved the Court for $3,170,600.20 in fees and expenses for services rendered through May 31, 1985. The Court will award the LDF $2,323,730.60 for these services. In addition, the LDF seeks $65,411.64 in fees and expenses incurred in pursuing its fee application. The Court will award the LDF $42,145.14 for such services. The State of Missouri defendants will be solely liable for the fees and expenses awarded by the Court. Co-defendant KCMSD has moved the Court for $1,298,198.70 in attorney's fees and litigation expenses for services

rendered through June 30, 1986. This motion will be denied. Intervenor Kansas City Missouri Federation of Teachers Local 691 moved the Court for $62,169.37 in attorney's fees and expenses incurred through March 1, 1987. This motion will be denied.

BENSON AND STAFF

Pursuant to 42 U.S.C. § 1988, the Court may allow the prevailing parties in this suit a reasonable fee as part of the costs. However, the plaintiffs in this case may only be considered prevailing parties for attorney's fees purposes if they succeeded on any significant issue in the litigation which achieved some of the benefit the parties sought in bringing the suit. Hensley v. Eckerhart, 461 U.S. 424, 433 (1983), quoting Nadeau v. Helgemoe,

581 F.2d 275, 278-79 (1st Cir. 1978). The plaintiffs in this action are undisputedly "prevailing parties" because this Court found in favor of the plaintiffs on their liability claims against the State of Missouri defendants and the KCMSD. Jenkins v. State of Missouri, 593 F.Supp. 1485, 1505 (W.D. Mo. 1984).

The first step in determining a reasonable attorney's fee is to multiply "the number of hours reasonably expended on the litigation times a reasonable hourly rate." Blum v. Stenson, 465 U.S. 886, 888 (1984). Mr. Benson acknowledges that under Hensley v. Eckerhart, 461 U.S. 424 (1983), he and his staff cannot receive compensation for all their time spent on this litigation since the plaintiffs were not successful in their

claims against the suburban school districts, the Kansas defendants, and the federal defendants. Accordingly, Mr. Benson excluded from the total time expended by him and his staff approximately 353 hours which he claims was clearly allocable to work done on the unsuccessful claims against these other defendants. The State argues that Benson and his staff failed to exclude additional hours that were expended solely on the unsuccessful claims. Contrary to the contentions of the State of Missouri, the Court finds that the specific exclusions made by Benson and his staff accurately represent the time allocable to unsuccessful claims in the litigation, and which was "distinct in all respects" from time spent on their successful claims. Hensley v. Eckerhart, 461 U.S. at 440.

The State also argues that the remaining time should be reduced by 50% because the plaintiffs were unsuccessful on their claim of interdistrict liability against the State and various other defendants. The Court finds that these remaining hours either related solely to the successful claims made by the plaintiffs against the State and the KCMSD, or were so closely interrelated among the remaining claims that they cannot be separated or reduced by some arbitrary percentage.

Finally, the State also requests an additional reduction of 5% for alleged duplication of effort. The State argues that because the plaintiffs utilized thirteen attorneys and numerous staff personnel in this case that there was

"inevitably" some duplication of effort. Having examined the time records submitted by Benson and his staff, the Court finds no such duplication. Retention of numerous attorneys and a large staff in this lengthy and complicated school desegregation case is certainly understandable and is not in itself a ground for reducing the hours claimed. Johnson University College of the University of Alabama in Birmingham, 706 F.2d 1205, 1205 (11th Cir. 1983).

For the reasons stated, the Court finds the hours submitted by Mr. Benson and his staff represent the time reasonably expended on this litigation.

The next step in arriving at reasonable attorney's fees is the determination of a reasonable hourly rate. In making

such a determination, the Court has carefully considered the twelve factors enumerated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1974) that have been adopted by the Eighth Circuit. E.g., Hardman v. Board of Education of Dollarway, Arkansas, 714 F.2d 823, 825 (8th Cir. 1983). Among these factors are the customary fee of the attorney and his experience, reputation and ability. The Court finds that Mr. Benson does not regularly charge an hourly rate in his civil rights practice. Therefore, the Court must consider the current Kansas City, Missouri hourly rate for attorneys with the litigation experience and expertise comparable to that of Mr. Benson.

It is undisputed that Mr. Benson is an experienced trial attorney who is widely

recognized as a highly qualified civil rights attorney in the Kansas City, Missouri area. Based on the evidence presented to the Court, the Court finds that the hourly rates for Kansas City, Missouri attorneys with litigation experience and expertise comparable to that of Mr. Benson range from $125.00 to $175.00 per hour. The Court finds that Mr. Benson's rate would fall at the higher end of this range based upon his expertise in the area of civil rights.

Two additional Johnson factors are particularly applicable in this case, i.e., the preclusion of other employment by the attorney due to acceptance of a case, and the undesirability of a case. The Court finds that from early 1983 until the end of 1985 Benson devoted nearly all

of his professional time to this case and was thereby precluded from accepting other employment. Similarly, Benson's staff was also precluded from other employment for a period of at least one year while working full time on this litigation.

The undesirability of this case should also be considered in determining Benson's reasonable hourly fee. Undeniably, this case has been very unpopular with many Missouri citizens as evidenced by various statements, editorials, articles and letters from parents, taxpayers and state officials.

In addition, the Court has considered delay in payment, a factor not listed in Johnson, in determining a reasonable attorney's fee for Benson's services. Mr. Benson's application is for services

rendered from March, 1979 through June 30, 1986. It is essential that his hourly rate include compensation for the delay in payment. Jorstad v. IDS Realty Trust, 643 F.2d 1305 (8th Cir. 1981).

Accordingly, having carefully considered the twelve factors set forth in Johnson, and the additional factor of delay in payment, the Court finds that a reasonable hourly rate for Mr. Benson's services from 1979 through June 30, 1986, is $200.00 per hour. This rate, multiplied by the number of hours reasonably expended by Mr. Benson on the litigation, results in an attorney's fee of $1,004,160.00. The Court will award Mr. Benson this amount for attorney's fees for services rendered through June 30, 1986.

Mr. Benson had requested an hourly rate of $125.00 an hour which when multiplied by his reasonable hours expended totals $627,600.00. However, he also requested additional awards of $370,042.00 for "quality of representation" and $1,135,800.00 for the "risk of nonpayment," creating a total fee request for his services of approximately $2.1 Million Dollars.

The Court finds that Benson's request is improper because under Blum v. Stenson, 465 U.S. 888, 898-900 (1984) the "quality of representation," along with the "novelty and complexity of the issues," "the special skill and expertise of counsel," and the "results obtained" from the litigation are presumably fully reflected in the product of the reasonable

hours and a reasonably hourly rate, and thus cannot serve as an independent as is for increasing the basic fee award. In the present case, the quality of Benson's representation as well as the other factors mentioned above, are fully reflected in the $1,004,160.00 fee calculated by the Court.

The Court is aware that an upward adjustment is permissible in the rare case where fee applicant offers specific evidence to show that the quality of service rendered was superior to that one reasonably should expect in light of the hourly rate charged and that the success was exceptional. Blum v. Stenson, 465 U.S. at 899. However, while Mr. Benson certainly provided quality representation in this case, the Court does not find that

this is the "rare case" which warrants an upward adjustment.

The question of upward adjustment based on the risk of loss, or as described by the plaintiffs, risk of nonpayment, was left open in Blum v. Stenson, supra. However, in Pennsylvania v. Delaware Valley Citizens Council for Clean Air, No. 85-5, slip op. at 20-21 (July 2, 1986), the Supreme Court reset the case for argument on that particular issue. To date, no such opinion has been rendered. Notwithstanding, the Court finds that the plaintiffs' likelihood of success in their claim against the State of Missouri defendants was very high, and thus Benson's risk of nonpayment very slight, because the State had mandated segregated schools for black and white children prior

to 1954 and had failed to take any affirmative steps to eliminate the unlawful segregation after 1954. This small risk of nonpayment is fully reflected in the reasonable attorney's fee calculated by the Court.

Benson also requests a fee award for the services of four attorneys whom he employed to assist him in the litigation of this case. Two of these attorneys, Ms. Burkdoll and Ms. Goering, were associates of Mr. Benson and billed 97% of the hours submitted by these four attorneys on the fee application. Mr. Benson requests an hourly rate of $80.00 per hour for Ms. Burkdoll and Ms. Goering. The evidence presented to the Court establishes that current Kansas City, Missouri hourly rates for associates with experience and

expertise comparable to Ms. Burkdoll and Ms. Goering range from $60.00 to $95.00 per hour. After careful consideration, the Court finds that $80.00 per hour is a reasonable hourly rate for their services. The Court notes that the $80.00 per hour rate is approximately $15 to $20 higher than the average hourly rate for Kansas City associates in 1982-84, the years in which Ms. Burkdoll and Ms. Goering compiled their hours. However, the differential is necessary to compensate Mr. Benson for the delay in payment. Accordingly, the Court will award Mr. Benson a total of $304,348.00 in fees for services rendered by Ms. Burkdoll and Ms. Goering from 1982 to 1984.

Benson also requested that he be awarded enhancements of $319,328 and

$287,912 for the services of Ms. Burkdoll and Ms. Goering for the risk of non-payment. As previously stated, the risk of nonpayment was very small and is fully reflected in the $80.00 per hour rate found to be reasonable by the Court.

The remaining two attorneys employed by Mr. Benson, Mr. Routman and Mr. Thomas, collectively compiled 89 hours from 1981 through 1983. At the time they began assisting Mr. Benson in this litigation, Mr. Routman had ten years of legal experience and Mr. Thomas five. Both are presently partners in Kansas City, Missouri law firms. After careful consideration, the Court finds that the hourly rate of $90.00 for Mr. Routman and $85.00 per hour for Mr. Thomas requested in the fee application are reasonable for

the Kansas City, Missouri area. Therefore, the Court will award Mr. Benson $7,663.00 in attorney's fees for the services of Mr. Routman and Mr. Thomas.

Mr. Benson also requested an enhancement of the above award for the risk of nonpayment. Again, the Court finds that such a risk is very small and is fully reflected in the hourly rates calculated by the Court.

Mr. Benson also employed seven paralegals and four law clerks for whom he requests fees. The evidence presented to the Court indicates that the current Kansas City hourly rates is $40.00 an hour for paralegals and $35.00 for law clerks, the rates requested by Mr. Benson. Therefore, the Court finds that the requested rates are reasonable for the

services rendered and will award Mr. Benson $225,084.50 for paralegal and law clerk fees. Furthermore, the Court notes that it has adequately compensated Mr. Benson for the delay in payment by calculating this award based upon the current, rather than the historical, hourly rates.

In addition, Mr. Benson requests $73,182.43 in litigation expenses that he has personally incurred from 1979 to June 30, 1986. The Court has carefully reviewed these expenditures and finds them necessary and reasonable in cost. Therefore, the Court will award the requested amount.

Mr. Benson also seeks $72,702.49 in fees and expenses incurred in preparing and litigating his fee application. Such fees and expenses are compensable under 42

U.S.C. § 1988. Doulin v. White, 549 F.Supp. 152, 159 (E.D. Ark. 1982). Mr. Benson was represented in his fee application by Mr. Russell Lovell, a professor of law at Drake University. Mr. Lovell is a regular lecturer on civil rights litigation, including attorney's fees. Prior to joining the law faculty at Drake University, Mr. Lovell practiced law for five years and served as counsel of record in approximately twenty federal court civil rights cases. Based upon the skill and experience of Mr. Lovell and type of work involved, the Court finds that $125.00 per hour is a reasonable Kansas City, Missouri hourly rate for preparing and litigating this fee application. The Court finds that the time records submitted by Mr. Lovell represent hours

reasonably expended on the fee application. Therefore, the Court will award $47,387.50 for services rendered by Mr. Lovell.

Mr. Benson requests a fee of $10,125.00 for his services in litigation of his fee application. Having reviewed the time records submitted by Mr. Benson, the Court finds that the 81 hours listed represent time that was reasonably expended on the litigation. In addition, the Court finds that the $125.00 hourly rate requested by Mr. Benson is a reasonable rate for the work performed. Therefore, the Court will award Mr. Benson the amount requested.

In addition, Mr. Lovell and Mr. Benson collectively employed three paralegals and two law clerks to assist in the prepara-

tion of the fee application. The Court has reviewed the hours submitted by these individuals and finds them reasonable. Furthermore, the rates requested, $40.00 per hour for paralegals and $35.00 per hour for law clerks, are certainly reasonable rates for the Kansas City area. Therefore, the Court will award the $7,865.00 in fees requested for these staff members.

Finally, Mr. Benson requests $7,324.49 for expenses incurred in litigation of this fee application. Having reviewed the records submitted, the Court finds that these expenditures were necessary and their cost reasonable and will award the amount requested.

In summation, the Court finds that Mr. Benson and his staff are entitled to a

total award of $1,687,139.92 in fees and expenses for services rendered from 1979 to June 30, 1986, and for fees and expenses incurred in litigating his fee application. To date, Mr. Benson has received $347,332.93 of this amount, leaving a balance due of $1,339,806.99.

THE LEGAL DEFENSE FUND

The Court finds that this highly complex case required resources far beyond those available to Mr. Benson. Therefore, it was necessary for Mr. Benson to obtain the assistance of an organization such as the LDF. The LDF entered the case in March, 1982 as co-counsel for the plaintiffs and is now requesting an award of $3,170,600.20 in fees and expenses for services rendered through May, 1985.

Approximately $2.5 Million of the total amount requested by the LDF

represents fees of attorneys, paralegals and law clerks. As stated previously, the first step determining a reasonable fee is to multiply the number of hours reasonably expended on the litigation times a reasonable hourly rate. Blum v. Stenson, 465 U.S. 886, 888 (1984). Regarding the hours submitted by the LDF, the Court finds that the LDF properly excluded the time that was clearly allocable to work done on the unsuccessful claims pursuant to Hensley v. Eckerhart, 461 U.S. 424 (1983). The Court finds that the remaining hours, except for 3.5 hours submitted by Mr. Liebman for a 12-21-83 flight from Kansas City to New Mexico, were reasonably expended on the litigation, and are deserving of compensation.

In determining a reasonable hourly rate for the services of the various LDF

attorneys and support personnel, it is noteworthy that such fees are to be calculated according to the prevailing market rates in the relevant community, regardless of whether plaintiff is represented by private or nonprofit counsel. Blum v. Stenson, 465 U.S. at 895. The "relevant community" is the "general locality in which the litigation takes place." International Travel Arrangers, Inc. v. Western Airlines, Inc., 623 F.2d 255, 1275 (8th Cir. 1980). Therefore, the hourly rates to be awarded the attorneys and staff of the New York based LDF will be determined according to Kansas City, Missouri rates.

Seven of the LDF staff attorneys assisted Mr. Benson in the litigation of this case from March 1982 to May 1985. In

determining a reasonable hourly rate for each attorney's services, the Court has considered the twelve factors in Johnson v. Georgia Highway Express, Inc., 488 F.2d at 717-19. The LDF attorneys are salaried and do not charge a customary fee. Therefore, the Court must judge the experience, reputation and ability of the individual attorneys and determine a reasonable hourly rate for a Kansas City, Missouri attorney with similar experience and expertise. Based upon the evidence presented, the Court finds that the current Kansas City, Missouri hourly rate for attorneys with litigation experience and expertise comparable to that of LDF attorneys Liebman, Johnston, and Lief range from $125 to $175 per hour. In addition, the Court finds that these

attorneys are entitled to compensation for delay in payment. Therefore, the Court will award the LDF attorney's fees at the current, rather than historical, rates. Accordingly, the Court finds that the $160.00 requested by Mr. Liebman is a reasonable hourly rate and will award the LDF $650,688.00 for his services rendered through May of 1985. Similarly, the Court finds that $175.00 per hour is a reasonable hourly rate for the services of Mr. Johnson and Ms. Lief and will award fees of $62,002.50 and $122,447.50 respectively for their services.

The Court finds that the experience and expertise of attorneys Shaw, Fins, Winter and Hair at the time of their involvement in this case is comparable to that of associates with five or fewer

years experience. The current Kansas City hourly rate for such associates ranges from $60.00 to $95.00 per hour. Therefore, the Court finds that a reasonable hourly rate for the services of Mr. Shaw, Mr. Winter, Ms. Hair and Ms. Fins is $95.00 per hour and the Court will award the LDF a total of $384,617.00 for their services.

LDF had requested rates higher than those awarded by the Court claiming that the complexity and scope of the litigation prompted a hiring freeze and precluded it from accepting other cases for which it would receive payment sooner. The Court considered this factor, but finds that during this litigation the LDF employed additional attorneys who were not involved in this litigation and were available for work on other cases.

The LDF also requested the Court to award it a contingency enhancement of $688,874.30. As stated previously, the Court finds that the plaintiffs' risk of loss, and thus the LDF's risk of nonpayment, was very slight and is fully reflected in the reasonable fees calculated by the Court.

In addition, the LDF requests an award for the services of numerous paralegals, law clerks and recent law graduates. Based upon the evidence presented, the Court finds that the requested rates of $50.00 an hour for recent law graduates, $40.00 for paralegals, and $35.00 an hour for law clerks are comparable to the current Kansas City, Missouri rates for these services. Therefore, the Court will award the LDF $431,337.75 in fees for the

services rendered from March, 1982 to May 1985.

In addition, the LDF requests $672,637.85 in litigation expenses. The Court has carefully reviewed these expenditures and finds that they were necessary and their cost reasonable. Accordingly, the Court will award the LDF the requested amount.

The LDF also requested an award of $65,411.64 in attorney's fees and expenses incurred in the preparation and litigation of their fee application. The Court has reviewed the time records submitted by the four attorneys who represented the LDF in their fee application and finds that they contain only those hours that were reasonably expended on the litigation. However, the Court finds that the New York

rates requested by these attorneys, ranging from $160.00 to $330.00 per hour, are excessive and do not reflect a reasonable hourly rate in the Kansas City, Missouri area for similar work. As the Court found in considering Mr. Benson's request for attorney's fees incurred in litigating his fee application, $125.00 per hour is a reasonable hourly rate for such work in the Kansas City, Missouri area. Thus, the Court will award the LDF $29,050.00 in fees for services rendered in litigating its fee application.

The LDF also requests $ 11,441.33 for expenses incurred in litigating its fee application. Having carefully reviewed these expenditures, the Court finds that they were necessary and their cost reasonable and will award the amount requested.

KCMSD

KCMSD requests an award of $1,298,198.70 for attorney's fees and expenses for work performed from March, 1977 through June, 1986. The issue before the Court is whether the Kansas City, Missouri school district is a "prevailing party" within the meaning of 42 U.S.C. § 1988.

A party may be considered a prevailing party for attorney's fees purposes if they "succeed on any significant issue in the litigation which achieves some of the benefit the party sought in bringing suit." Hensley v. Eckerhart, 461 U.S. at 433. For purpose of analysis of the attorney's fees issues, the "notion of 'prevailing party' is to be interpreted in a practical, not formal, manner."

Northcross v. Board of Education, 611 F.2d 624, 636 (6th Cir. 1979), cert. denied, 447 U.S. 911 (1980).

This Court did find in favor of the defendant KCMSD on its crossclaim against the State of Missouri defendants. Jenkins v. State of Missouri, 593 F.Supp. 1485, 1505 (W.D. Mo. 1984). However, in its crossclaim, the KCMSD simply reiterated the allegations of the plaintiffs that the State of Missouri had failed to take action to dismantle its prior dual school system, and had acted to perpetuate the segregation. This Court found for the plaintiffs on this same claim against the state defendants. Jenkins v. State of Missouri, 593 F.Supp. at 1505. While the KCMSD has certainly been improved by the remedial plans ordered by the Court after

assessing liability against the State and the KCMSD, it is the plaintiffs, the victims of unlawful segregation, who have benefited by prevailing on this claim originally alleged in their complaint and subsequently made by the KCMSD in its crossclaim against the State of Missouri. Moreover, the Court finds that the same remedial plans would have been ordered, and thus the KCMSD would have received the same benefits, even if it had not reiterated the plaintiffs' allegation in its crossclaim.

In addition, KCMSD in its crossclaim charges that the State should be required to contribute financially to any remedial plan the Court might order as relief against the KCMSD. The KCMSD was adjudged liable for adopting ineffective policies

to change the segregative patterns and was subsequently directed to fund approximately 20% of the initial remedy ordered by the Court. Jenkins v. State of Missouri, 639 F.Supp. 19 (W.D. Mo. 1986). However, on appeal, the Eighth Circuit held that the desegregation costs ordered by this Court should be divided equally between the KCMSD and the State of Missouri because both were adjudged constitutional violators. Jenkins v. State of Missouri, 807 F.2d 657, 684-85 (8th Cir. 1988).

Finally, the KCMSD alleges in its crossclaim, as did the plaintiffs in their complaint, that the State is liable for interdistrict violations. It is undisputed that the KCMSD and the plaintiffs failed in their attempt to prove an interdistrict liability against the State of Missouri.

Therefore, after a cross examination of the KCMSD's crossclaim against the State of Missouri defendants, the Court finds that the KCMSD, as a practical matter, is not a "prevailing party" within the meaning of 42 U.S.C. § 1988.

Notwithstanding the foregoing analysis, there exists a separate and compelling reason why the KCMSD should not be awarded attorney's fees and expenses in this case. In Jenkins v. State of Missouri, 593 F.Supp. 1485 (W.D. Mo. 1984), this Court found that the KCMSD had violated the United States Constitution by adopting policies which perpetuated, rather than eliminated, segregation in its schools. Therefore, the Court finds it inappropriate to award attorney's fees to a constitutional violator.

Accordingly, the KCMSD's motion for an award of attorney's fees and expenses will be denied.

AFT 691

Intervenor Kansas City, Missouri Federation of Teachers Local 691 (AFT 691) requests an award of $62,169.37 for attorney's fees and expenses incurred through March 1, 1987. This determination lies within the sound discretion of this Court. Little Rock School District v. Pulaski County Special School District, 787 F.2d 372 (8th Cir. 1986).

As noted several times in this opinion, a party may be considered a prevailing party under 42 U.S.C. § 1988 if it succeeds on any significant issue in the litigation which achieved some of the benefits the party sought in bringing

suit. Hensley v. Eckerhart, 461 U.S. at 433. AFT 691 was granted leave to intervene in this case on November 5, 1985, following the Court's liability order of September 17, 1984. AFT 691 had sought leave to intervene to protect the interest of its members and to assist the Court in fashioning a remedy to further integration. Notwithstanding, AFT 691's participation in this litigation has been de minimis. As other courts have recognized, this Court finds that an intervenor should not be awarded attorney's fees unless it has played a significant role in the litigation. Grove v. Mead School District No. 354, 753 F.2d 1528 (9th Cir. 1985), cert. denied, 106 S.Ct. 85 (1985).

Accordingly, AFT 691's application for attorney's fees and expenses will be

denied.

LIABILITY FOR THE FEES AND EXPENSES AWARDED

For the reasons set forth in this opinion, the Court will award the plaintiffs approximately $4 Million in attorney's fees and expenses for work performed in this case. The remaining question before the Court is against whom will these fees be charged.

Plaintiffs succeeded on their liability claim against the State of Missouri defendants in this case. Jenkins v. State of Missouri, 593 F.Supp. 1485, 1505 (W.D. Mo. 1984). This Court found the State of Missouri to be the primary constitutional violator because it had mandated separate schools for black and white children prior to 1954, and after 1954 had failed to take any affirmative

action to eliminate the vestiges and devastating effects of the dual school system it had created. Jenkins v. State of Missouri, 593 F.Supp. at 1505-06. Accordingly, the Court finds that the State of Missouri defendants are liable for the attorney's fees and expenses to be awarded plaintiffs' counsel in this case.

This Court also found in favor of the plaintiffs in their claim against the KCMSD. Jenkins v. State of Missouri, 593 F.Supp. at 1505. However, the Court did not find that the KCMSD caused the unlawful segregation within its district, but rather that it failed to fulfill its constitutional obligation to act to disestablish the dual school system created by the State of Missouri. Jenkins v. State of Missouri, 593 F.Supp. at 1504.

This Court found that the KCMSD had adopted policies which were ineffective in eliminating the unlawful segregation. Id.

Despite the adjudged constitutional violations of the KCMSD, the Court finds that the KCMSD is not chargeable for the attorney's fees and expenses to be awarded by the Court. The KCMSD, originally a plaintiff in this action, was involuntarily made a defendant by the Court in 1978. School District of Kansas City, Missouri v. State of Missouri, 460 F.Supp. 421, 445 (W.D. Mo. 1978). After 1978, the KCMSD and the plaintiffs cooperated closely in the development and prosecution of the litigation and the KCMSD actually acknowledged prior to trial that it had violated the constitutional rights of the plaintiffs.

In addition, the Court notes that in May, 1980 the State of Missouri defendants were adjudged "primary constitutional violators" in the St. Louis school desegregation case on facts very similar to those in the present case. Liddell v. Board of Education of the City of St. Louis, Missouri, 491 F.Supp. 351, 359 (E.D. Mo. 1980), aff'd, 667 F.2d 643 (8th Cir. 1981). Despite this finding, the State of Missouri defendants persisted in denying liability during the 10-1/2 month trial in this case on the liability issues.

For the reasons stated, the Court will order that the State of Missouri defendants are solely liable for the $4,053,015.66 in fees and expenses to be awarded the plaintiffs in this case.

Accordingly, it is hereby

ORDERED that the Court awards Mr. Benson $1,614,437.43 in fees and expenses for services rendered by him and his staff from 1979 through June 30, 1986; and it is further

ORDERED that the Court awards Mr. Benson $72,702.49 in fees and expenses incurred in litigating his fee application; and it is further

ORDERED that because Mr. Benson has previously received $347,332.93 of this award, the balance due Mr. Benson is $1,339,806.99; and it is further

ORDERED that the Court awards the LDF $2,323,730.60 in fees and expenses for services rendered through May of 1985; and it is further

ORDERED that the Court awards the LDF $42,145.14 for fees and expenses incurred

in litigating its fee application; and it is further

ORDERED that the State of Missouri defendants are solely liable for the $4,053,015.88 in fees and expenses awarded by the Court, including the $347,332.93 the State has previously paid Mr. Benson; and it is further

ORDERED that the KCMSD's motion for an award of attorney's fees and expenses is denied; and it is further

ORDERED that AFT 691's motion for an award of attorney's fees and expenses is denied.

RUSSELL G. CLARK, DISTRICT JUDGE
UNITED STATES DISTRICT COURT

Dated: May 11, 1987

SUMMARY OF FEES/EXPENSES AWARDED

Benson and Staff

1.

Attorneys	Hours	Hrly Rate	Award
Benson	5,020.8	200	1,004,160.00
Burkdoll	1,996.0	80	159,680.00
Goering	1,808.35	80	144,668.00
Routman	23.0	90	2,070.00
Thomas	65.8	85	5,593.00

2.

Paralegals/Law Clerks			
Johnson	3,860.1	40	154,404.00
Harrison	236.0	40	9,440.00
Zinn	1,058.3	40	42,332.00
Chavez	21.5	40	860.00
Fitzpatrick	95.4	40	3,816.00
Borge	96.9	40	3,876.00
Pugh	210.0	40	8,400.00

DeSimone	24.8	35	868.00
Mansour	19.3	35	675.00
Donohoe	10.3	35	360.50
Petren	1.5	35	52.50

3.

Expenses 73,182.43

Subtotal 1,614,437.43

4.

Fees/Expenses in Litigation of Fee Application

a. Attorneys

Lovell	379.1	125	47,387.50
Benson	81.0	125	10,125.00

b. Paralegals/Law Clerks

Pugh	40.0	40	1,600.00
Cole	21.5	40	860.00
Pence	38.0	40	1,520.00
Apple	66.0	35	2,310.00

Krulewitch	45.0	35	1,575.00
c. Expenses			7,324.99
		Subtotal	72,702.49
		Total Award	1,687,139.92
Less Amount previously paid to Benson			347,332.93
Balance of Award due Benson			1,339,806.99

LDF

	Hours	Hrly Rate	Award
1. Attorneys			
Liebman	4,066.8	160	650,688.00
Shaw	2,522.5	95	239,637.50
Lief	699.7	175	122,447.50
Fins	1,299.7	95	123,471.50
Johnston	354.3	175	62,002.50
Hair	30.5	95	2,897.50
Winter	195.9	95	18,610.50
2. Paralegals	3,254.6	40	130,184.00
3. Law Clerks	5,717.85	35	200,124.75
4. Recent Law Graduates	2,020.58	50	101,029.00
5. Expenses			672,837.85
		Subtotal	2,323,730.60
6. Fee/Expenses in Litigating Fee Application			
a. Attorneys			
Liebman	42.5	125	5,312.50
Ralston	158.1	125	19,762.50
Topkis	21.8	125	2,725.00
Chambers	10.0	125	1,250.00
b. Expenses			13,095.14
	Subtotal		42,145.14
	Total Award		2,365,875.74

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

KALIMA JENKINS, et al.,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 77-0420-CV
	)	W-4
STATE OF MISSOURI, et al.	)	
	)	
Defendants.	)	

ORDER

Several motions are presently before this Court. Plaintiffs have moved the Court to amend its order of May 11, 1987 that awarded attorney's fees to plaintiffs' counsel. This motion will be granted in part and denied in part. Plaintiffs also moved the Court to amend the long-range magnet school order of November 11, 1986 to add the extended day program to the two environmental science

elementary magnet programs at North Rock Creek and Korte Schools. This motion will be granted. Finally, the State of Missouri has moved the Court to strike KCMSD's Suggested Findings and Conclusions regarding the year 3 desegregation budget. This motion will be denied.

Motion to Amend Attorney's Fees Order

Plaintiffs moved the Court to amend its May 11, 1987 attorney's fees order to award Mr. Benson and his staff additional fees and expenses for their services rendered in monitoring the remedial programs from June 14, 1985 through June 14, 1986. Mr. Benson had requested $42,090.45 for these services on July 1, 1986 but had failed to include this request in his summary of fees requested that he filed with the Court on March 13, 1987. In the

present motion, Benson has increased his request for these monitoring services to $52,781.45.

This Court previously found that the hourly rates for the Kansas City, Missouri attorneys with litigation experience and expertise comparable to that of Mr. Benson range from $125 to $175 per hour. See May 11, 1987 order at p. 4. The Court also found that Mr. Benson's rate would fall at the higher end of this range based upon his expertise in the area of civil rights. Id. After considering the twelve factors enumerated in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717-19 (5th Cir. 1984), and the additional factor of delay in payment, the Court concluded that a reasonable hourly rate for Mr. Benson's services was $200.00. However, this fee

was for Mr. Benson's services in litigating the lawsuit, not for his time expended in monitoring the implementation of the remedial plan ordered by the Court. The Court finds that time spent in monitoring the remedial plan should be charged at a substantially lower rate, and recently applied this approach in G.L., an infant, by and through his Next Friend, et al., v. Zumwalt, et al., Case No. 77-0242-CV-W-4, March 27, 1987. Therefore, the Court finds that the $125.00 hourly rate originally requested by Mr. Benson for these services is reasonable. Furthermore, the Court finds that $40.00 per hour for paralegals and $35.00 per hour for law clerks are reasonable rates for these services in the Kansas City area. The Court also finds that the hours

submitted by Benson and his staff represent the time reasonably expended in monitoring and implementing the remedial plan in year 1985-86. The number of hours, multiplied by the rates found to be reasonable by the Court, results in an additional fee award of $37,950.00.

In addition, Mr. Benson requests $3,478.00 in expenses incurred in monitoring the remedial plan in 1985-86. Having reviewed the records submitted, the Court finds that expenditures were necessary and their costs reasonable and awards the amount requested.

Accordingly, the Court awards Mr. Benson and his staff an additional $42,090.45 in fees and expenses incurred in monitoring and implementing the remedial plan in 1985-86. Furthermore,

for the reasons set forth in the Court's order of May 11, 1987, the State of Missouri defendants are solely liable for these additional fees and expenses awarded to Mr. Benson and his staff.

The plaintiffs also moved the Court to amend its findings with regard to the number of hours voluntarily excluded by Benson and his staff from their fee applications pursuant to Hensley v. Eckerhart, 461 U.S. 424 (1983). After re-examining the applications submitted by Mr. Benson, the Court finds that it failed to recognize in its May 11, 1985 order the initial reductions made by Mr. Benson and his staff. With these additional reductions, the total number of hours excluded by Benson and his staff approximate 4,490 hours and the Court modifies its previous

order to reflect this amount. However, this amendment does not affect the Court's previous award of attorney's fees because that award was based solely on the remaining hours for which Benson and his staff requested compensation, hours that the Court found were either related solely to the successful claims made by the plaintiffs against the State and the KCMSD, or were so closely interrelated among the remaining claims that they could not be separated.

Plaintiffs also moved the Court to increase their attorney's fees award to reflect the risk of nonpayment in this case. As previously found by this Court, the plaintiffs' likelihood of success in their claim against the State of Missouri was very high and thus Benson's risk of

nonpayment very slight, because of the State's discriminatory actions. This small risk of nonpayment was fully reflected in the reasonable attorney's fees awarded plaintiffs' counsel and therefore the Court denies Mr. Benson's request to increase his award.

Plaintiffs also moved the Court to amend its findings as to the total amount of fees and expenses sought by Mr. Benson and his staff to reflect the $347,332.93 previously paid to Mr. Benson by the State and the $42,090.45 in fees and expenses for services rendered in monitoring the remedial plan in 1985-86. In its order of May 11, 1987, the Court stated that Benson "has moved for $3,310,587.00 in fees and expenses for services rendered by him and his staff

through June 30, 1986." This amount simply represented the alleged balance due of the total fee award Mr. Benson was requesting. For clarification, the Court modifies the second sentence of its May 11, 1987 order to read:

> Plaintiffs co-counsel, Arthur Benson, has moved for a total of $3,700,010.30 in fees and expenses for services rendered by him and his staff through June 30, 1986.

The above modification has no effect on the amount of fees and expenses awarded by the Court.

Long-Range Magnet School Order

Plaintiffs have moved the Court to amend its long range magnet school order of November 12, 1986 to add the extended day program to the two environmental science elementary magnet programs at

North Rock Creek and Korte Schools. This proposal was approved by the Desegregation Monitoring Committee on May 5, 1987 and was agreed upon by all parties at the May 11-12 hearing on the 1987-88 desegregation budget. Accordingly, plaintiffs' motion will be granted and the long-range magnet school order of November 12, 1986 will be modified as requested.

Motion to Strike

On June 15, 1986, the KCMSD filed Suggested Findings and Conclusions relating to the 1987-88 desegregation budget. Subsequently, the State of Missouri moved to strike that pleading claiming it was not permitted by any filing schedule issued by the Court and

because the State did not have adequate time to fully respond to KCMSD's suggestions.

Rule 12(f), Fed.R.Civ.P., permits a Court to strike from a pleading "any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Generally, motions to strike are disfavored and in the instant case the State's motion is improper as there is no claim that anything in KCMSD's pleading is redundant, immaterial, impertinent or scandalous. However, the Court acknowledges that the State may not have had sufficient time to respond to KCMSD's suggestions and therefore did not consider either KCMSD's suggested findings or the State's brief response in ruling on the year three desegregation budget.

Accordingly, it is hereby

ORDERED that the plaintiffs' motion to amend the Court's order of May 11, 1987 regarding attorney's fees is granted in part and denied in part as set forth in this order; and it is further

ORDERED that the Court modifies the long-range magnet order of November 12, 1986 to include the extended day program at North Rock Creek and Korte Elementary Schools; and it is further

ORDERED that the State of Missouri's motion to strike KCMSD's Suggested Findings and Conclusions relating to the 1987-88 desegregation budget is denied.

RUSSELL G. CLARK, DISTRICT JUDGE
UNITED STATES DISTRICT COURT

Dated: July 14, 1987

(3)

No. 88-50

Supreme Court, U.S.
FILED
SEP 8 1988
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1988

KALIMA JENKINS, et al.,
Petitioners,

vs.

STATE OF MISSOURI, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

WILLIAM L. WEBSTER
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TERRY C. ALLEN
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QUESTION PRESENTED

Whether 42 U.S.C. § 1988 entitles counsel for plaintiffs who prevail on certain claims against certain defendants in a public school desegregation case to a "contingency enhancement" as a separate element in an award of attorneys' fees, over and above the hourly rate that the district court found to be reasonable under the circumstances, after an evidentiary hearing that included expert testimony on the manner in which the local and national markets in attorneys' rates reflect compensation for the risk of nonrecovery, as well as testimony relevant to the likelihood that other counsel would have been available to the plaintiffs.

LIST OF PARTIES

Respondents accept the petitioners' list of parties.

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I. In its opinion resolving the "contingency enhancement" issue against the petitioners, the court of appeals took account of this Court's decision in *Delaware Valley II*, and found that under none of the theories espoused by this Court would the petitioners' counsel be entitled to a bonus, multiplier, or enhancement over and above the lodestar fee on account of any pretended "risk of nonpayment" in the underlying case 5

A. Plaintiffs were not prejudiced by the intervention in time of this Court's decision in *Delaware Valley II* between the district court's hearing and initial order concerning attorneys' fees, on the one hand, and its denial of reconsideration and the appeal of its fee orders, on the other, because they cannot meet a necessary condition of any "contingency enhancement" under *Delaware Valley II*, *i.e.*, a showing that without the enhancement they seek, they would have been unable to attract counsel 8

B. The market approach suggested in the *Delaware Valley II* concurrence does not

require an equation of awards of attorneys' fees under federal fee-shifting statutes to hypothetical hourly rates recovered by attorneys handling private-law cases on a contingent-fee basis 12

C. That the district court heard various contingent-fee attorneys and law-practice economists testify about their fee-setting practices and those they believed to be common in the Kansas City area and throughout the nation, and subsequently found that its lodestar rates for Mr. Benson and his staff adequately compensated him for the risk of nonpayment in the underlying case, provides a sufficient basis for leaving undisturbed the judgment of the district court and the opinion of the court of appeals in respect to the denial of a separate contingency enhancement 14

II. Petitioners exaggerate the uncertainty, if any, created by this Court's *Delaware Valley II* decision in respect to the means by which risk of nonpayment may be considered, in appropriate cases, in setting statutory attorneys' fees for prevailing parties 15

A. Assuming arguendo the existence of any conflict between certain circuits concerning the issue on which the petitioners seek a writ of certiorari, this case would not provide an appropriate vehicle for "resolving" the alleged differences, because the court of appeals panel that

heard their appeal and affirmed the judgment of the district court was in one of the circuits whose general position on this issue the petitioners endorse 15

B. The cases cited by the petitioners as evidence of a conflict among the circuits on this issue do not in fact reflect conflicts between decisions, only a variety in the expression of the rationales of the "minority" courts of appeals, as well as differences of fact between the cases decided by them after this Court's decision in *Delaware Valley II* 17

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RESPONDENTS' BRIEF IN OPPOSITION

The State of Missouri; the Hon. John D. Ashcroft, Governor; Robert Bartman, Commissioner of Education; and the State Board of Education, Roseann Bentley, Dan Blackwell, Terry A. Bond, Roger L. Tolliver, Raymond McCallister, Jr., Susan D. Finke, Thomas R. Davis, and Cynthia B. Thompson, Members—the respondents herein—respectfully request that this Court deny the petition for writ of certiorari filed by the plaintiffs below, seeking review of that portion of the opinion of the United States Court of Appeals for the Eighth Circuit denying the plaintiffs' appeal from the district court's denial of a "contingency enhancement" to the fees awarded to their counsel and his staff. The opinion of the Court of Appeals is reported at 838 F.2d 260.

STATEMENT OF THE CASE

In 1977 the Kansas City, Missouri, School District (hereinafter "KCMSD") and certain of its students filed a civil action in the United States District Court for the Western District of Missouri, alleging unlawful segregation according to color in the public schools of the greater Kansas City area. Their complaint alleged that officials, officers, and agencies of the federal government, the States of Missouri and Kansas, and various suburban school districts "had caused or had been part of a system of racial segregation among Kansas City metropolitan area school districts." *Jenkins v. Missouri*, 807 F.2d 657, 661

(8th Cir. 1986), *cert. denied*, 108 S.Ct. 70 (1987). In October 1978 the district court dismissed the action as against the Kansas defendants for want of jurisdiction, and realigned KCMSD—one of the parties that brought the action—as a defendant. *Ibid.* Subsequently KCMSD filed a crossclaim against the State defendants. Petitioners' Appendix (hereinafter "Pet. App.") 75a.

Plaintiffs' present local counsel, Arthur A. Benson II, began representing the plaintiffs no later than March 15, 1979. Pet. App. 12a; *Jenkins v. Missouri*, No. 77-0420-CV-W-4 (W.D. Mo.), Docket Sheet at 29, Doc. No. 1 (entry of appearance). On May 20, 1979, the plaintiffs filed an amended complaint against the suburban and federal defendants as well as the State defendants, alleging both an interdistrict violation and an intradistrict violation, and seeking an interdistrict remedy. *Id.*, Doc. No. 22. In March 1982 the Legal Defense Fund of the National Association for the Advancement of Colored People (hereinafter the "Fund") joined Mr. Benson as counsel for the plaintiffs. Pet. App. 65a. In June 1985, the district court found that the federal and suburban defendants were not liable, and denied an interdistrict remedy; it found KCMSD and the State defendants liable on the basis of past acts and omissions, and began the process of formulating and implementing an intradistrict remedy. *Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo.), *aff'd*, 807 F.2d 657 (8th Cir. 1986), *cert. denied*, 108 S.Ct. 70 (1987).

Plaintiffs' counsel moved for attorneys' fees and expenses pursuant to 42 U.S.C. § 1988. On behalf of himself and his staff, Mr. Benson sought $3,310,587.00, Pet. App. 43a, which he later increased by $52,781.45, Pet.

App. 93a, for a total of $3,363,368.45. Of this sum, Mr. Benson claimed $1,135,800.00 for himself, Pet. App. 54a, $319,328 and $287,912 for two associates, Pet. App. 58a-59a, and additional sums in respect to other staff, Pet. App. 59a-61a—an amount in excess of $1,743,040.00—as an "enhancement" of his fees under section 1988 for the "risk of nonpayment" associated with his representation of the plaintiffs. (By contrast, the NAACP Legal Defense Fund, Inc., sought a contingency enhancement of $688,874.30, Pet. App. 71a, out of a total request of $3,170,600.20, Pet. App. 65a. Thus, whereas both Mr. Benson and the Fund, Inc., requested about the same amount overall, Mr. Benson requested over $1.7 million as a risk enhancement, whereas the Fund, Inc., requested less than $700,000.) KCMSD also sought attorneys' fees on the basis of its having prevailed in its crossclaim against the State defendants. Pet. App. 75a. On February 27, 1987, the district court held an evidentiary hearing on the plaintiffs' and their ally's motions for attorneys' fees, at which several attorneys and economists testified concerning the market value of Mr. Benson's services, in light of the billing practices in the Kansas City area at the time of the litigation on the merits. Petition at 9, 11-16 (citing and quoting transcript).

In an unpublished Order dated May 11, 1987, the district court rejected Mr. Benson's claim of a separate "enhancement" for himself and his staff, finding that the "small risk of nonpayment" for their services was "fully reflected in the reasonable attorney's fee calculated by the Court." Pet. App. 57a, 59a & 60a. This rate was two hundred dollars ($200) per hour. Pet. App. 53a. By its Order of May 11, 1987, therefore, the district court

awarded Mr. Benson and his staff $1,614,437.43 in fees and expenses, Pet. App. 85a, which it augmented in its unpublished Order of July 14, 1987, by $42,090.45, Pet. App. 95a, for a total of $1,656,527.88. The district court denied attorneys' fees to KCMSD, Pet. App. 79a and 86a, noting that the District had been adjudicated a constitutional violator in the same action, Pet. App. 78a; that KCMSD had originally been a plaintiff in the action, was only involuntarily made a defendant, "cooperated closely [with the plaintiff class] in the development and prosecution of the litigation," and "actually acknowledged prior to trial that it had violated the constitutional rights of the plaintiffs," Pet. App. 83a; and that in its cross-claim, KCMSD "simply reiterated the allegations of the plaintiffs . . . ," Pet. App. 75a.

Plaintiffs requested reconsideration of the district court's order insofar as it denied the separate "enhancement" in question, and the district court denied reconsideration by an Order dated July 14, 1987—*after* this Court's announcement of its decision on June 26, 1987, of *Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, 107 S.Ct. 3078 (1987) (hereinafter *"Delaware Valley II"*).

Most parties to the action in the district court appealed this resolution of the attorneys' fees issues. Both the plaintiffs below and the respondents addressed the issue whether *Delaware Valley II* required any re-examination of the district court's fee orders. On the issue before this Court in the plaintiffs' petition—as on all others—the United States Court of Appeals for the Eighth Circuit affirmed the judgment of the district court. Pet. App. 42a. It observed that this Court had rendered its

decision in *Delaware Valley II* after the district court had issued its opinion on the attorneys' fees. Pet. App. 38a. The court of appeals resolved this specious difficulty by finding—based on its review of the record below—that under none of the theories advanced in the opinions of this Court in *Delaware Valley II* would Mr. Benson and his staff be entitled to a "contingency enhancement." Pet. App. 38a-42a.

This petition followed.

ARGUMENT

I. In its opinion resolving the "contingency enhancement" issue against the petitioners, the court of appeals took account of this Court's decision in Delaware Valley II, **and found that under none of the theories espoused by this Court would the petitioners' counsel be entitled to a bonus, multiplier, or enhancement over and above the lodestar fee on account of any pretended "risk of nonpayment" in the underlying case.**

In the instant case, one of the attorneys for the plaintiff class in a school desegregation case—having received an award of over $1.7 million in attorneys' fees—appeals from the decision of the court of appeals affirming the trial court's judgment denying him an additional $1.7 as a "contingency enhancement."

A unique circumstance in this case is that the district court made the contested decision on attorneys' fees on

June 14, 1987, twelve days before this Court announced its opinion in *Delaware Valley II*, setting forth certain criteria for the grant or denial of contingency enhancements under federal fee-shifting statutes. On July 14, 1987, however—eighteen days after this Court's decision in *Delaware Valley II*—the district court denied in pertinent part the plaintiffs' motion to alter or amend. Respondents assume that at some point during this eighteen-day period, the petitioners' counsel must have learned of this Court's decision and could have brought to the district court's attention any argument based on it that he believed would support the motion to alter or amend. In the briefs on the subsequent appeal, the parties addressed the application of *Delaware Valley II* to the instant case at some length, and the court of appeals discussed it explicitly in its decision affirming the judgment of the district court.

In *Delaware Valley II*, plaintiff had obtained an award of attorneys' fees under 42 U.S.C. § 7604(d), *i.e.*, section 304(d) of the Clean Air Act, for the work of their attorneys in securing the implementation of a consent decree between the plaintiffs and the Commonwealth of Pennsylvania. In calculating the award, the district court had doubled the lodestar for certain phases of the attorneys' work as a "contingency enhancement," and the court of appeals had affirmed.

This Court reversed the decision of the court of appeals. In the opinion of the Court on some points and a plurality opinion on others, Justice White stated (for the plurality):

> Before adjusting for risk assumption, there should be evidence in the record, and the trial court should

> so find, that without risk-enhancement plaintiff would have faced substantial difficulties in finding counsel in the local or other relevant market. Here there were no such findings.
>
> Accordingly, the judgment of the Court of Appeals is *Reversed.*

107 S.Ct. at 3089 (footnote, citing *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986), omitted).

Justice O'Connor delivered a separate opinion, concurring in part and concurring in the judgment. In common with the plurality, she stated that "a court may not enhance a fee award any more than necessary to bring the fee within the range that would attract competent counsel." *Id.* at 3091 (concurring in part and concurring in the judgment). Four Justices dissented, believing that the plurality "ignore[d] the fact that a fee that may be appropriate in amount when paid promptly and regardless of the outcome of the case may be inadequate and inappropriate when its payment is contingent upon winning the case." *Ibid.* (Blackmun, J., dissenting). Justice O'Connor agreed with the dissenters that a contingency enhancement should sometimes be awarded, and that "compensation for contingency must be based on the difference in market treatment of contingent fee cases *as a class*, rather than on an assessment of the 'riskiness' of any particular case," *id.* at 3089; but because she found that the district court had not made findings which would support an award of a contingency enhancement, she agreed with the plurality that the judgment in the case before the Court should be reversed.

A. Plaintiffs were not prejudiced by the intervention in time of this Court's decision in Delaware Valley II **between the district court's hearing and initial order concerning attorneys' fees, on the one hand, and its denial of reconsideration and the appeal of its fee orders, on the other, because they cannot meet a necessary condition of any "contingency enhancement" under** Delaware Valley II, i.e., **a showing that without the enhancement they seek, they would have been unable to attract counsel.**

In the concurring opinion of Justice O'Connor and in the plurality opinion of Justice White in *Delaware Valley II*, the Court established as a necessary condition of awarding a risk enhancement the requirement that the party seeking fees must show "that without the adjustment for risk the prevailing party 'would have faced substantial difficulties in finding counsel in the local or other relevant market.'" 107 S.Ct. at 3091 (concurring opinion), quoting *id.* at 3089 (plurality opinion).

Petitioners cannot credibly argue that they could not have obtained counsel without such an adjustment, because other counsel was in fact representing the plaintiffs—not the same individuals, to be sure, but plaintiffs nonetheless—from before Mr. Benson's entry of appearance. *School District of Kansas City, et al. v. Missouri, et al.*, 460 F. Supp. 421, 426 (W.D. Mo. 1978). Mr. Benson came on the scene after KCMSD had been involuntarily and formally realigned as a defendant—when it was one of the parties that had initially sought to have the State of Missouri and various other entities and persons held

liable for interdistrict segregation and ordered to provide an interdistrict remedy for it. *Id.* at 442, 445. It strains credulity to argue that no one—no zealous or ambitious attorney whose existing commitments did not preclude such a task—would have undertaken to serve as "co-operating counsel" for the NAACP, Petition at 13-14, in this case.

What is even more unlikely is that no attorney would have come forward without the assurance of a bounty of the proportions now sought by Mr. Benson, when the statutes and case law in force at the time made no such commitment. Mr. Benson went into this litigation without a legislative or judicial promise of *any* "contingency enhancement" at all—only a "reasonable" fee if his clients prevailed. There was no evidence at the fees hearing or otherwise in the record that the plaintiffs—let alone Congress or the federal courts—induced Mr. Benson to prosecute this litigation by any offer of a $1.7 million premium over and above the "reasonable" fees and expenses provided for prevailing parties under 42 U.S.C. § 1983. State respondents are unaware of record evidence of any reliance, reasonable or otherwise, on such a bounty.

It is impossible to evaluate the asserted difficulty that the plaintiffs would have had in obtaining counsel in this case but for the bait of a contingency enhancement without considering their strategic and tactical position at the time Mr. Benson entered his appearance. Consequently, a consideration of this factor in *Delaware Valley II* necessarily entails inquiry concerning the alleged "risk" involved in the particular underlying case, whether or not such alleged risk is to be taken into account as a separate factor. Such an inquiry deals with the practical risk that

would be entailed by an attorney's taking the case, as distinguished from the "legal" risk of nonrecovery in the abstract.

In arguing that the district court and the court of appeals erred in not ordering the State to pay Mr. Benson an extra $1.7 million, the plaintiffs exaggerate the practical "risk" of receiving no payment at all that he undertook in prosecuting their case. From the first stages of the litigation—*before* he came on as counsel for the plaintiffs—the baseline constitutional violator, KCMSD, had effectively admitted that there was unconstitutional discrimination against the children it was charged to educate. It had both physical control and working knowledge of the documents, tangible things, and other evidence that a plaintiff's lawyer would ordinarily have a difficult time obtaining through the normal operation of Fed. R. Civ. P. 26-37. Rather than resisting the plaintiffs' claims, KCMSD filed a crossclaim against the State defendants—seeking to cast the blame for violations within its jurisdiction on the State and on the suburbs surrounding Kansas City, in an unsuccessful attempt to obtain an interdistrict remedy. In light of the open collaboration of this key player, it is a wonder that Mr. Benson could have spent as much as he did—and could have taken as long as he has taken—to achieve the partial success which he would have this Court regard as so "exceptional." Petition at 31.

In making their argument for another $1.7 million, the plaintiffs say that Mr. Benson went into debt by more than $730,000 in order to finance the underlying litigation. Petition at 32. As is true of any other aspect of the case, of course, no one forced him to go to this extreme. But with respect to the allegation that other counsel would

not have come forward but for the promise of a "contingency enhancement" of over 100% of the amount the district court and the court of appeals found reasonable *taking into account the risk of nonpayment*, one must wonder how risky Mr. Benson's creditors considered the underlying case.

Although the record is scant on the indebtedness allegedly incurred, it is reasonable to assume that the average person or institution with three-quarters of a million dollars to lend will have the means and motive to check out the enterprise which is supposed to provide the repayment of the principal. If Mr. Benson could obtain such a large loan using his expectancy of a fee award in the underlying case as collateral, it stands to reason that other counsel could also have been obtained—perhaps counsel who would have sought and obtained the support of the NAACP Legal Defense Fund, Inc., sooner and to a greater degree. Although some of the plaintiffs' experts testified that they would not have taken the case themselves, or that it is generally difficult to find attorneys to handle school desegregation cases, Petition at 12-14 (citing transcript), there was no evidence that a single attorney turned down the plaintiffs in this case.

Consequently, no such bounty was necessary to attract counsel in this case. There is therefore no proximate cause between the district court's decision not to award a contingency enhancement separate from the fees and expenses it found to be reasonable and any hypothetical inability of these plaintiffs or future plaintiffs to obtain counsel. To award one now would be to give Mr. Benson a windfall profit of more than $1.7 million over and above the $1.7 million already found to be "reasonable" by the district court and the court of appeals.

B. The market approach suggested in the Delaware Valley II concurrence does not require an equation of awards of attorneys' fees under federal fee-shifting statutes to hypothetical hourly rates recovered by attorneys handling private-law cases on a contingent-fee basis.

Justice O'Connor's concurrence observes that "[t]he private market commonly compensates for contingency through arrangements in which the attorney receives a percentage of the damages awarded to the plaintiff," but in the next sentence recognizes that "[i]n most fee-shifting cases . . . the private market model of contingency compensation will provide very little guidance." 107 S.Ct. at 3089-90. One of the ways in which the analogy between contingent-fee personal injury cases and public law actions in which fee-shifting provisions are common breaks down is that in many of the latter cases, the plaintiffs' "goal is to secure injunctive relief to the exclusion of any claim for damages." *Id.* at 3087 (plurality opinion). In such cases, the amount that must be spent by one or more defendants to fund a remedy may overstate or understate the degree of benefit received by the plaintiffs as a result of their attorneys' efforts, and would therefore be a misleading basis for calculating fees under the appropriate statute.

The concurrence proceeds to suggest that the district courts and courts of appeals "treat a determination of how a particular market compensates for contingency as controlling future cases involving the same market." *Id.* at 3090 (O'Connor, J., concurring in part and concurring in the judgment). This point is perfectly consistent with the treatment of cases under federal fee-shifting statutes as

sui generis—*i.e.*, a class of cases analogous to but not the same as contingent-fee cases handled independently of these statutes. It would indicate that the contingency enhancement, if any, in one case should not vary substantially from that in previous fee-shifting cases before the same court or other courts.

Under this analysis, the relevant "market" for attorneys' fees under federal fee-shifting statutes would be reflected in the federal judiciary itself—in a manner analogous to a stock exchange—rather than by an attempt to replicate the operation of contingent-fee contracts freely entered into between willing clients and willing attorneys in private-law matters: litigants before the federal trial courts would determine the "going rate" by negotiation in light of earlier awards of attorneys' fees, and the district and appellate courts would determine the "going rate" when the parties could not agree. Such a flexible notion of the relevant "market" is appropriate to this calculation, in light of the concurrence's acknowledgment that it would be impossible to mimic the model of contingent-fee practice in the private market.

C. That the district court heard various contingent-fee attorneys and law-practice economists testify about their fee-setting practices and those they believed to be common in the Kansas City area and throughout the nation, and subsequently found that its lodestar rates for Mr. Benson and his staff adequately compensated him for the risk of nonpayment in the underlying case, provides a sufficient basis for leaving undisturbed the judgment of the district court and the opinion of the court of appeals in respect to the denial of a separate contingency enhancement.

In its evidentiary hearing of February 27, 1987, the district court heard testimony from Kansas City attorneys who handle plaintiffs' cases on a contingent-fee basis, as well as from "the leading civil rights private practitioner in Iowa" and two economists, concerning the amount by which the private market recognizes risk of nonrecovery and consequent nonpayment under contingent-fee contracts. Petition at 12-13, 14-16 (citing transcript). Consequently, the plaintiffs had—and exercised—the opportunity to put on the very kind of evidence that would be relevant to the district court's determination of the fees for Mr. Benson and his staff under the reading of the *Delaware Valley II* concurrence which is most favorable to them.

Both initially, without the benefit of this Court's opinions in *Delaware Valley II*, and on the plaintiffs' motion for reconsideration—which was overruled *after* the announcement of the latter decision—the district court which had heard the underlying case declined to enhance Mr. Benson's fees above and beyond the enhancement re-

flected in its lodestar calculation. Consequently, Mr. Benson has not been prejudiced by the unique intervention in time of the *Delaware Valley II* decision between the fees hearing and initial order on the one hand and the motion to reconsider, the order denying it, and the fees litigation in the court of appeals, on the other.

II. Petitioners exaggerate the uncertainty, if any, created by this Court's Delaware Valley II **decision in respect to the means by which risk of nonpayment may be considered, in appropriate cases, in setting statutory attorneys' fees for prevailing parties.**

Petitioners contend that there is a conflict among the circuits concerning the propriety of a district court's considering the risks of nonrecovery in the particular case before it when evaluating a prevailing party's claim for a contingency enhancement under a federal fee-shifting statute. Petition at 38-41.

A. Assuming arguendo the existence of any conflict between certain circuits concerning the issue on which the petitioners seek a writ of certiorari, this case would not provide an appropriate vehicle for "resolving" the alleged differences, because the court of appeals panel that heard their appeal and affirmed the judgment of the district court was in one of the circuits whose general position on this issue the petitioners endorse.

First of all, even assuming that such a conflict existed, the petitioners themselves have not been prejudiced there-

by, because they include the Eighth Circuit—which decided their case—as one of the six (6) that have adopted a reading of the *Delaware Valley II* opinion substantially consistent with theirs on the issue whether the relevance of the "legal" risk of nonrecovery per se in a particular case. Petition at 34, 40-41. Indeed, in its opinion, the court of appeals made explicit its reliance on Justice O'Connor's concurrence as stating the views of a majority of the Court, and that this majority "disapproved enhancement decisions based on 'legal risks' peculiar to a particular case." Pet. App. 39a-40a.

Petitioners are in the unique position of having received less than they desire in attorneys' fees in an order of the district court issued shortly before this Court's *Delaware Valley II* decision, which order was reaffirmed in a subsequent order issued shortly after that decision. Although the court of appeals took account of *Delaware Valley II* and agreed with the petitioners concerning the issue on which they allege there to be conflict among the circuits, the petitioners disagree with the court of appeals' resolution of the factual question whether they "would have faced substantial difficulties in finding counsel in the local or other relevant market." 107 S.Ct. at 3089 (O'Connor, J., concurring in part and concurring in the judgment).

Any alleged conflict among the circuits is therefore beside the point. Even if there were a conflict, and this Court were to resolve it in the manner urged by the petitioners, the result in this case would be the same.

B. The cases cited by the petitioners as evidence of a conflict among the circuits on this issue do not in fact reflect conflicts between decisions, only a variety in the expression of the rationales of the "minority" courts of appeals, as well as differences of fact between the cases decided by them after this Court's decision in Delaware Valley II.

In arguing that there is "Confusion And Conflict Among The Circuits" on the propriety of considering the prevailing party's likelihood of success on the merits at any stage in the decision whether to award an enhanced fee to compensate counsel for assuming the risk of nonrecovery and nonpayment, the petitioners rely on three (3) decisions subsequent to *Delaware Valley II* as creating a conflict by not identifying the position of Justice O'Connor as reflecting a majority of the Court on this issue. Whereas the Third, Fourth, Fifth, Eighth, District of Columbia, and Federal Circuits interpret the decision as relying on the criteria articulated by Justice O'Connor in concurrence, Pet. App. 34, the petitioners say that the First, Second, and Sixth Circuits "take a different tack," and "have not adopted Justice O'Connor's standard [but] have continued to base post-*Delaware Valley II* contingency enhancement decisions in part on their evaluation of the particular risks posed by the case, Pet. App. 39. Following this assertion is a string citation of one decision from each of the allegedly errant circuits, on the basis of which the petitioners urge this Court to exercise its certiorari jurisdiction to resolve this horrendous conflict.

A reading of the three cases indicates that there is no conflict between these three decisions, on the one

hand, and the position of the Eighth Circuit in general or its resolution of the issue on which the petitioners seek certiorari, on the other. The earliest of these decisions is *Jacobs v. Mancuso*, 825 F.2d 559 (1st Cir. 1987). It was decided on July 24, 1987—less than one month after *Delaware Valley II*. In Jacobs, the First Circuit did not ignore this Court's decision, however, but distinguished it, by pointing out that in the underlying case before it, there was no basis for a contingency multiplier. Respondents do not understand the petitioners to contend that prevailing parties' attorneys are always entitled to a "contingency enhancement" even in the absence of contingency. In the part of the *Jacobs* opinion that appears to trouble the petitioners, however, the First Circuit says nothing more remarkable than that:

> From the standpoint of contingency, liability here was so plain . . . that, as a practical matter, the risk of not recovering a fee was all but eliminated. *Cf. Pennsylvania v. Delaware Valley Citizens' Council for Clean Air*, ... U.S. ....., 107 S.Ct. 3078, 97 L.Ed.2d 585 (1987).

Id. at 561. By using the signal "Cf.," the court of appeals indicated that *Delaware Valley II* "supports a proposition different from the main proposition but sufficiently analogous to lend support." Harvard Law Review Association, A Uniform System of Citation 9 (14th ed. 1986). Here, the proposition for which *Delaware Valley II* stands is that a prevailing party's attorney may be entitled to some enhancement *if* there was a risk of nonrecovery, as further articulated by this Court. That was "different from" the situation before the First Circuit in *Jacobs*, where the district court had found that there

was *no* practical risk of nonrecovery, and hence, no contingency.

Jacobs is not in conflict with the "majority" decisions—including the Eighth Circuit's denying the petitioners' local attorney an extra $1.7 million for a partial success—because it does not clash with the proposition for which the petitioners cited the other six circuits' opinions. It is simply beside the point. One may agree with all six of these circuits' opinions on how to measure a contingency enhancement while maintaining that an attorney is not entitled to such an enhancement in a case where no contingency was present.

Next, the petitioners cite *Friends of the Earth v. Eastman Kodak Co.*, 834 F.2d 295 (2d Cir. 1987). This case was, like *Delaware Valley II* itself, an environmental case; counsel were seeking fees under 33 U.S.C. § 1365(d). In *Friends of the Earth*, the Second Circuit applied *Delaware Valley II* to deny a contingency enhancement on the ground that "it does not appear that a bonus was necessary to attract competent counsel." *Id.* at 298. It explained the linkage between the risk of nonrecovery and the difficulty vel non of attracting counsel by citing one of its earlier decisions, *Lewis v. Coughlin*, 801 F.2d 570, 576 (2d Cir. 1986). In *Lewis* it had said, "the rationale that should guide the court's discretion is whether '[w]ithout the possibility of a fee enhancement . . . competent counsel might refuse to represent [environmental] clients thereby denying them effective access to the courts.'" It noted that "[t]his position is similar to that taken by the plurality and Justice O'Connor" in *Delaware Valley II*. 834 F.2d at 298. This decision is indeed in harmony with *Delaware*

Valley II—having been cited by the plurality on this very point, with which Justice O'Connor explicitly concurred, 107 S.Ct. at 3089 & n.12 (plurality opinion), 3091 (concurring in part and concurring in the judgment)—and with the "majority" circuits identified in the Petition.

Finally, the petitioners cite *Conklin v. Lovely*, 834 F.2d 543 (6th Cir. 1987). In *Conklin*, the Sixth Circuit set forth the respective positions of the Members of this Court in *Delaware Valley II*, and remanded the case before it for "specific factual findings" in light of its opinion. *Id.* at 553. Petitioners seem to find *Conklin* offensive in that it also cited and quoted at length from another Sixth Circuit opinion, *Northcross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979), *cert. denied*, 447 U.S. 911 (1980), which—like *Jacobs v. Mancuso*—had the temerity to suggest that there are some cases so strong that the attorney who takes them has not assumed the risk for which contingency enhancements exist to compensate counsel. 611 F.2d at 638.

Such a suggestion is not in conflict with the decisions of the other six circuits, unless they are to be interpreted to read "contingency" out of "contingency adjustment," and to mandate an automatic bonus for attorneys who take cases for which Congress has provided that attorneys' fees may be available. But that position would be absurd. It is certainly not the one taken by the Eighth Circuit in the instant case or by this Court in *Delaware Valley II*. Petitioners may find *Conklin* less than a full-throated expression of their deepest jurisprudential longings, but it is not in conflict with the position they attribute to the six circuits with which they align themselves on the proper construction of *Delaware Valley II*. Petition at 39-40.

None of the three cases cited as creating a conflict among the circuits—nor the group of three in the aggregate—comes close to doing so. Petitioners' claim of "confusion" merely reflects the differences between fact-situations arising before the panels that have applied *Delaware Valley II*. Petitioners have utterly failed to demonstrate the existence of a conflict at all, let alone one that would be resolved by a re-examination of their local counsel's claim for an additional $1.7 million over and above the $1.7 million already awarded him.

CONCLUSION

Wherefore, the petition of the plaintiffs below for a writ of certiorari should be denied.

Respectfully submitted,

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